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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 156

THE UNITED STATES, PETITIONER,

vs.

COMMODITIES TRADING CORPORATION, ET AL.

No. 163

COMMODITIES TRADING CORPORATION, ET AL., PETITIONERS,

vs.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 1, 1949 (Case No. 156)
PETITION FOR CERTIORARI FILED JULY 5, 1949 (Case No. 163)
CERTIORARI GRANTED OCTOBER 24, 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 156

THE UNITED STATES, PETITIONER,

vs.

COMMODITIES TRADING CORPORATION, *et al.*

No. 163

COMMODITIES TRADING CORPORATION, *et al.*,

PETITIONERS,

vs.

THE UNITED STATES.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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1

In the
Court of Claims of the United States

46611

COMMODITIES TRADING CORPORATION
and IRVING TRUST COMPANY,
PLAINTIFFS,
against
THE UNITED STATES OF AMERICA,
DEFENDANT.

Petition—Filed Oct. 3, 1945

To the Honorable the Court of Claims:

The petition of COMMODITIES TRADING CORPORATION and IRVING TRUST COMPANY respectfully represents, upon information and belief:

1. That plaintiff, COMMODITIES TRADING CORPORATION, is, and at all times hereinafter mentioned it was, a corporation created by and existing under and by virtue of the laws of the State of Delaware, having its principal place of business at No. 80 Broad Street, Borough of Manhattan, New York City; that it has at all times through its officers and agents borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

2 2. That plaintiff, IRVING TRUST COMPANY, is, and at all times hereinafter mentioned was, a banking corporation created and existing under and by virtue of the laws of the State of New York, having its principal place of business at No. One Wall Street, Borough of Manhattan, New York City; that it has at all times through its officers and agents borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

3. That plaintiffs are the original and sole owners of the claim hereinafter presented, never having sold nor assigned the same, nor any part thereof, nor any interest therein.

4. That at all times hereinafter mentioned, plaintiff, COMMODITIES TRADING CORPORATION, has engaged in the business of holding a stock of Whole Black Pepper for investment.

5. That Public Law 274, 77th Congress, approved October 16, 1941, Ch. 445, as amended by Public Law 507, 77th

Congress, approved March 27, 1942; Public Law 104, 78th Congress, approved June 30, 1943, provides in part as follows:

"That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval * * * supplies * * * is needed for the defense of the United States;

3 (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided. * * *. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act, * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the Fifth Amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for such property, is unwilling to accept the same as full and complete compensation for such property, he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by Sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be the fair and just compensation for such property. * * *"

6. That the authority conferred upon the President above referred to was duly delegated to the Secretary of War and to the Undersecretary of War. Executive Orders 8942, 9024, 9040, 9138, 9280, 9294, 9322, 9334 and order of Sec. of War, dated Dec. 11th, 1941 and Army Procurement Reg. 14.

4 7. That acting under such statutory powers delegated to him, the Undersecretary of War duly issued "War Department Requisition No. 197" on or about

the 23rd day of May, 1944, directed to 2nd Lt. Paul Barron, Q. M. C., a copy of which is hereto attached marked Exhibit A and made a part of this petition.

8. That on or about the 26th day of May, 1944, said 2nd Lt. Paul Barron, Q. M. C., named in said requisition, did, pursuant to said requisition, take over for the use of the United States or in its interest, 773,201 pounds of Lampong type Whole Black Pepper belonging to the plaintiffs. That at the time of the said taking the said property was located at Hoboken, New Jersey, in the custody of Hoboken Dock Stores, Inc.

9. That plaintiffs had, on the date of such taking, the following right, title and interest in and to such property:

Plaintiff, COMMODITIES TRADING CORPORATION, had full and complete ownership, subject to a lien of plaintiff, IRVING TRUST COMPANY, to secure advances made to plaintiff, Commodities Trading Corporation, by plaintiff, IRVING TRUST COMPANY.

10. That no other persons had any right, title or interest in or to the said property on the date of such taking.

11. That plaintiffs gave notice at once of their claim to said pepper and for compensation for said taking to said 2d Lt. Paul Barron, Q. M. C., Jersey City Quartermaster Depot, referred to in said Exhibit "A"; that said Lt. Barron prescribed the form and time and manner of presenting the claim of the plaintiffs and plaintiffs duly presented and filed its claim for compensation for such taking in the manner and form prescribed and duly verified and within the time fixed for presenting said claim for filing. That in said proof of claim plaintiffs set forth that they were entitled to the sum of $190,000, together with interest at 6% per annum from May 26th, 1944, as an element of just compensation on account of said taking.

12. That thereafter and on or about the 25th day of August, 1944, plaintiffs received notice of a preliminary determination of $50,266.76 as the fair and just compensation for said pepper, and an offer by the War Department of the United States to pay said amount in satisfaction of plaintiffs' said claim which said preliminary determination and offer was dated Aug. 23rd, 1944.

13. That thereafter and on the 22nd day of September, 1944, plaintiffs duly filed with the Quartermaster General, Washington, D. C., their objections in writing to said preliminary determination and their formal rejection of said determination and offer of payment; that said objections were duly verified and were made in the manner and form

All persons having any claim to or interest in any of the above-described property are directed to give notice of their claims at once to 2nd Lt. Paul Barron, QMC, Jersey City Quartermaster Depot, 34 Exchange Place, Jersey City, New Jersey, who will prescribe the form and manner of presenting such claims.

Washington, D. C., 23 May, 1944.

ROBERT P. PATTERSON
Under Secretary of War
By: E. B. GREGORY
Major General
The Quartermaster General

13 *General Traverse—Filed October 22, 1945*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

A B R
E E E

(s) JOHN F. SONNET
Acting Head, Claims Division

Supplemental Petition—Filed April 7, 1948

On April 7, 1948, plaintiffs filed their Supplemental Petition by leave of Court, which is as follows:

15 In the Court of Claims of the United States

Docket 46611.

COMMODITIES TRADING CORPORATION and IRVING TRUST COMPANY, WILLIAM T. HUNTER, DAVID S. HUNTER, ALICE D. HUNTER, RUFUS H. COLBY, ELIZABETH H. STEVENSON, MARION H. SHUTT, FREDERICK D. TRISMEN, EDWARD L. BLACKMAN and WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as substituted Trustees, under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936 for Katharine Cole, WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as substituted Trustees under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936 for Jane Rulon Cole, WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as substituted Trustees under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936, for Philip Gillett Cole, Jr., and WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as substituted Trustees; under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936, for Katharine Pyle Cole and WILLIAM T. HUNTER, PHILIP GILLETT COLE, JR. and DWIGHT M. MIELS, as Trustees under the Twelfth Clause of the Last Will and Testament of Philip Gillett Cole, Deceased,

PLAINTIFFS,

against

THE UNITED STATES OF AMERICA,

DEFENDANT.

Supplemental Petition

16 *To the Honorable the Court of Claims:*

The Supplemental Petition of the plaintiffs respectfully represents:

1. That plaintiffs COMMODITIES TRADING CORPORATION and IRVING TRUST COMPANY filed their petition with this Court on or about the 14th day of September, 1945, wherein and whereby they asked for just compensation for the requisitioning on or about the 26th day of May, 1944 of approximately 773,201 pounds of Lampong Type Whole Black Pepper by the Under-Secretary of War by War Department Requisition No. 197.

2. That prior to the 1st day of December, 1945, plaintiff, Commodities Trading Corporation, began proceedings to liquidate and dissolve and, being a corporation organized and existing under the Laws of the State of

Delaware, it filed, on or about the 11th day of December, 1945, a unanimous consent of its Stockholders to dissolution, pursuant to and in compliance with the Laws of such State, and on or about the 17th day of January, 1946, a Certificate of its Dissolution was issued by the Secretary of State of the State of Delaware.

3. That pursuant to the Plan of Liquidation and Dissolution of said Commodities Trading Corporation, the assets of the Company which were on hand at the time mentioned in the Paragraph immediately above, were distributed to its Stockholders in kind, in proportion to the stock holdings of each in the total capital stock of the Company.

4. That said distribution included the Cause of Action pending in this Court on the petition of said
17 Commodities Trading Corporation and Irving Trust Company for compensation for the taking by the War Department of the United States of the pepper mentioned in Paragraph 1 above by Army Requisition No. 197 and by reason of said distribution, the parties plaintiff hereinafter named in this Paragraph became the owners, by assignment dated January 22, 1946, of said claim in the following proportions, but subject to lien of plaintiff, Irving Trust Company, for its advances made to said Commodities Trading Corporation.

William T. Hunter	385/11,000ths
David S. Hunter	473/11,000ths
Ruth H. Colby	473/11,000ths
Alice D. Hunter	473/11,000ths
Elizabeth H. Stevenson	473/11,000ths
Marion H. Shutt	473/11,000ths
Frederick D. Trismen	1374½/11,000ths
Edward L. Blackman	1375½/11,000ths

William T. Hunter, Earl A. Darr and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Katharine Pyle Cole, dated 12/5/36—550/11,000ths

William T. Hunter, Earl A. Darr and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Katharine Cole (Jr.) dated 12/5/36—550/11,000ths

William T. Hunter, Earl A. Darr and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Philip Gillett Cole, Jr. dated 12/5/36—550/11,000ths

William T. Hunter, Earl A. Darr and Philip Gillett Cole, Jr., as Successor Trustees under Dec-

laration of Trust for Jane Rulon Cole, dated 12/5/36—550/11,000ths

18 William T. Hunter, Philip Gillett Cole, Jr. and Dwight M. Mills as Trustees of Trust created under Paragraph 12 of the Last Will and Testament of Philip Gillett Cole, Deceased—3300/11,000ths

5. That pursuant to two orders of this Court entered on the 17th and 31st days of March, 1948, respectively, the said parties enumerated in Paragraph 4 have intervened and each of them hereby does intervene and adopt the petition herein and the proceedings heretofore had, and agrees to be bound thereby, and requests that said suit continue in all respects as if said parties and each of them had been a party plaintiff from the beginning.

6. That each of the said new plaintiffs has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

7. That said plaintiffs enumerated in Paragraph 4 are now the sole owners of the claim presented in this action, subject to lien of plaintiff, Irving Trust Company, never having sold or assigned the same, ~~nor~~ any part thereof, nor any interest therein, and that no other person or persons have any right, title or interest in or to this claim except plaintiff, Irving Trust Company, whose claim is set forth directly in the petition filed herein by it and Commodities Trading Corporation.

8. That these plaintiffs enumerated in Paragraph 4 reallege on information and belief each of the allegations set forth in the paragraphs of the original petition,

19 numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

9. That each of the persons above named as a Trustee of each of the trusts created by said Philip G. Cole by Declaration of Trust is presently a duly authorized and existing Trustee of each of the said trusts and that neither his authority nor his appointment has been revoked in any case, and that said Hunter, Darr and Cole, Jr. are all of the Trustees of said trusts.

10. That the persons above described as Trustees under the Twelfth Clause of the Last Will and Testament of Philip Gillett Cole, Deceased, are the duly appointed and continuing Trustees thereof and that their Letters of Trusteeship are still in full force and effect and that said Hunter, Cole, Jr. and Hills are all of said Trustees.

11. That proof of the appointment and authority of said Trustees is herewith submitted.

WHEREFORE plaintiffs demand from the defendants the sum of $190,000 together with just compensation for delay in payment measured by the legal rate of interest of 6% per annum.

COMMODITIES TRADING CORPORATION
IRVING TRUST COMPANY
WILLIAM T. HUNTER
DAVID S. HUNTER
ALICE D. HUNTER
RUTH H. COLBY
ELIZABETH H. STEVENSON
MARION H. SHUTT
FREDERICK D. TRISMEN
EDWARD L. BLACKMAN

20 WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as Substituted Trustees under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936 for Katharine Cole, WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as Substituted Trustees under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936 for Jane Rulon Cole, WILLIAM T. HUNTER, EARL A. DARR and PHILIP GILLETT COLE, JR., as Substituted Trustees under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936, for Philip Gillett Cole, Jr. and WILLIAM T. HUNTER EARL A. DARR and PHILIP GILLETT COLE, JR., as Substituted Trustees under Declaration of Trust made by Philip Gillett Cole, dated December 5, 1936, for Katharine Pyle Cole, and WILLIAM T. HUNTER, PHILIP GILLETT COLE, JR. and DWIGHT M. MILLS, as Trustees under the Twelfth Clause of the Last Will and Testament of Philip Gillett Cole, Deceased.

By EDWARD L. BLACKMAN
Attorney for Plaintiffs
120 Broadway
New York City

Dated: April 6th, 1945.

21 *Duly sworn to by Edward L. Blackman.*
Jurat omitted in printing. (All in italics)

23 *General Traverse to Supplemental Petition—Filed April 13, 1948*

And now comes the Attorney General, on behalf of the United States, and answering the supplemental petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the supplemental petition be dismissed.

K.M.B. (s) H. G. MORISON
D. B. M. *Assistant Attorney General*
E.T.F.

Argument and submission of case

On November 2, 1948, the case was argued and submitted on merits by Mr. Edward L. Blackman, for plaintiffs, and by Mr. Kendall M. Barnes for defendant.

25 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J. Dissenting opinion by Madden, J.—Filed April 4, 1949*

Mr. Edward L. Blackman, for the plaintiffs.
Mr. Kendall M. Barnes, with whom was *Acting Assistant Attorney General J. Frank Staley*, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Irving Trust Company is, and at all times hereinafter mentioned was, a banking corporation organized and existing under the laws of the State of New York, having its principal place of business at 1 Wall Street, New York, N. Y.

Plaintiff, Commodities Trading Corporation hereinafter sometimes referred to as "Commodities," was incorporated under the laws of the State of Delaware on June 23,

1933. Subsequent to the bringing of this action, Commodities began proceedings to liquidate and dissolve. On or about December 11, 1945, Commodities filed a unanimous consent of its stockholders to dissolution, in accordance with the laws of the State of Delaware, and on January 7, 1946, a certificate of dissolution was issued by the State of Delaware. Under the laws of the State of Delaware such proceedings for dissolution continue the corporation powers for a period of three years for the purpose of winding up its affairs, and the proof in this case indicates that this three-year period began January 7, 1946.

26 Pursuant to the plan of liquidation and dissolution of Commodities, the assets of the company which were on hand were duly distributed to the stockholders in kind, in proportion to the stock holdings of each, of the capital stock of the corporation. The said distribution included the instant cause of action pending in this Court.

The names of these stockholders, and the fractional part of this claim distributed to each of them, were as follows:

William T. Hunter—385/11,000ths.
David S. Hunter—473/11,000ths.
Ruth H. Colby—473/11,000ths.
Alice D. Hunter—473/11,000ths.
Elizabeth H. Stevenson—473/11,000ths.
Marion H. Shutt—473/11,000ths.
Frederick D. Trismen—1374½/11,000ths.
Edward L. Blackman—1375½/11,000ths.
William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Katharine Pyle Cole, dated 12/5/36—550/11,000ths.
William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Katharine Cole (Jr.) dated 12/5/36—550/11,000ths.
William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Philip Gillett Cole Jr., dated 12/5/36—550/11,000ths.
William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Jane Rulon Cole, dated 12/5/36—550/11,000ths.
William T. Hunter, Philip Gillett Cole, Jr., and Dwight M. Mills as Trustees of Trust created under Paragraph 12 of the Last Will and Testament of Philip Gillett Cole, Deceased—3300/11,000ths.

By reason of said distribution the parties named above became the owners by assignment dated January 22, 1946, of the instant claim in the proportions set out, but subject to the lien of plaintiff Irving Trust Company for advances made to Commodities. The said parties are the lawful owners and holders of said assets or claims.

2. Pursuant to two orders of this Court entered on the 17th and 31st days of March 1948, respectively, the
27 parties enumerated in the preceding finding have intervened as parties plaintiff in this case and have adopted the petitions herein and the proceedings had in this cause, and they agree to be bound thereby, and they request that said action continue in all respects as if each of the parties had been a party plaintiff from the beginning.

Each of the persons above named as a trustee of each of the trusts created by Philip G. Cole by Declaration of Trust is presently a duly authorized and existing trustee of each of the said trusts and neither his authority nor his appointment has been revoked in any case, and said Hunter, Darr and Cole, Jr., are all of the trustees of said trusts.

The persons above described as trustees under the twelfth clause of the Last Will and Testament of Philip Gillett Cole, deceased, are the duly appointed and continuing trustees thereof and their letters of trusteeship are still in full force and effect, and said Hunter, Cole, Jr., and Mills are all of said trustees.

3. On or about May 26, 1944, the defendant, acting through the War Department and pursuant to the Act of October 16, 1941 (55 Stat. 742), as amended, duly requisitioned and took possession of 759,750.88 pounds of Lampong type whole black pepper stored at Hoboken Dock Stores, Inc., Hoboken, New Jersey, in the name of Commodities Trading Corporation. Copies of such requisition were, on the same day, served upon the plaintiffs, Commodities Trading Corporation and Irving Trust Company.

4. On the date of such requisition the 759,750.88 pounds of whole black pepper were owned by plaintiff Commodities Trading Corporation, subject to the lien of plaintiff Irving Trust Company, to whom the pepper had been pledged as security for advances theretofore made by it to Commodities. This lien, covering this pepper and other pepper formerly owned by Commodities, has now been reduced to about $53,000.

5. These 759,750.88 pounds were part of a holding of 16,153,000 pounds of whole black pepper then owned by

Commodities. At the outbreak of the war on December 7, 1941, Commodities had approximately 21,000,000 pounds of whole black pepper, 4,000,000 pounds of which had
28 been sold for future delivery. This pepper was delivered during the early months of 1942, and Commodities made very few sales thereafter from its inventory. This pepper had been accumulated by Commodities over the period from 1933 to the date of the requisition, the highest inventory having been in the neighborhood of 25,000,000 pounds in 1938.

6. On June 26, 1944, the War Department's "initial compensation officer" offered the plaintiffs, Commodities and Irving Trust Company, as compensation for such pepper, the ceiling price established under Maximum Price Regulation No. 52 issued by the Office of Price Administration, as that regulation existed on the date of requisition. Such offer was rejected by both of said plaintiffs.

On or about July 13, 1944, the plaintiffs, Commodities and Irving Trust Company, duly filed with the Commanding Officer, Jersey City Quartermaster Depot, a proof of claim for such pepper dated that day. In said proof of claim plaintiffs, Commodities and Irving Trust Company, claimed the sum of $190,000 as just compensation for the 773,201 pounds of pepper which were then believed to have been the accurate number of pounds requisitioned.

7. On August 23, 1944, the Chief Requisitioning Officer, Office of the Quartermaster General, made a preliminary determination of fair and just compensation for such pepper in the amount of $50,266.76. Such determination was computed at the ceiling prices for the pepper requisitioned, as established by Maximum Price Regulation No. 52, as it existed on the date of the requisition. Prompt notice of such determination was given to the plaintiffs, Commodities and Irving Trust Company.

On or about September 22, 1944, the plaintiffs, Commodities and Irving Trust Company, duly filed objections to such preliminary determination with the Chief Requisitioning Officer, Office of the Quartermaster General, who affirmed his determination by letter dated November 22, 1944.

Under date of September 26, 1945, an award of compensation for such pepper was made by the Acting Under Secretary of War in the amount of $52,808.28, of which $2,541.52 represented compensation for delay in payment com-
29 puted at the rate of four percent per year. The principal amount of the award was computed in the

same manner as the preliminary determination of compensation. Plaintiffs, Commodities and Irving Trust Company, were unwilling to accept such award as full compensation for such pepper, and on November 27, 1945, fifty percent of the amount of such award, or $26,404.14, was paid to said plaintiffs.

8. Whole black pepper is grown in Sumatra, French Indo-China, and India, the Lampong type being grown only in Sumatra. In March 1942, when this country was cut off from these producing areas (except India) by Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds of whole black pepper in the hands of importers in the United States (about three years' supply), approximately 17,000,000 pounds of which were held by Commodities Trading Corporation. On September 30, 1943 the holdings of Commodities continued at approximately 17,000,000 pounds of black pepper.

9. On December 11, 1941, the Office of Price Administration issued a ceiling price on whole black pepper. This was done by Price Schedule No. 52, which established a maximum price of 6.75 cents a pound ex dock or warehouse in New York City for Lampong type whole black pepper.

During the years 1936 to 1940, both inclusive, the average annual prices for Lampong type whole black pepper in New York City, computed from daily spot prices throughout the period, expressed in cents per pound, had been:

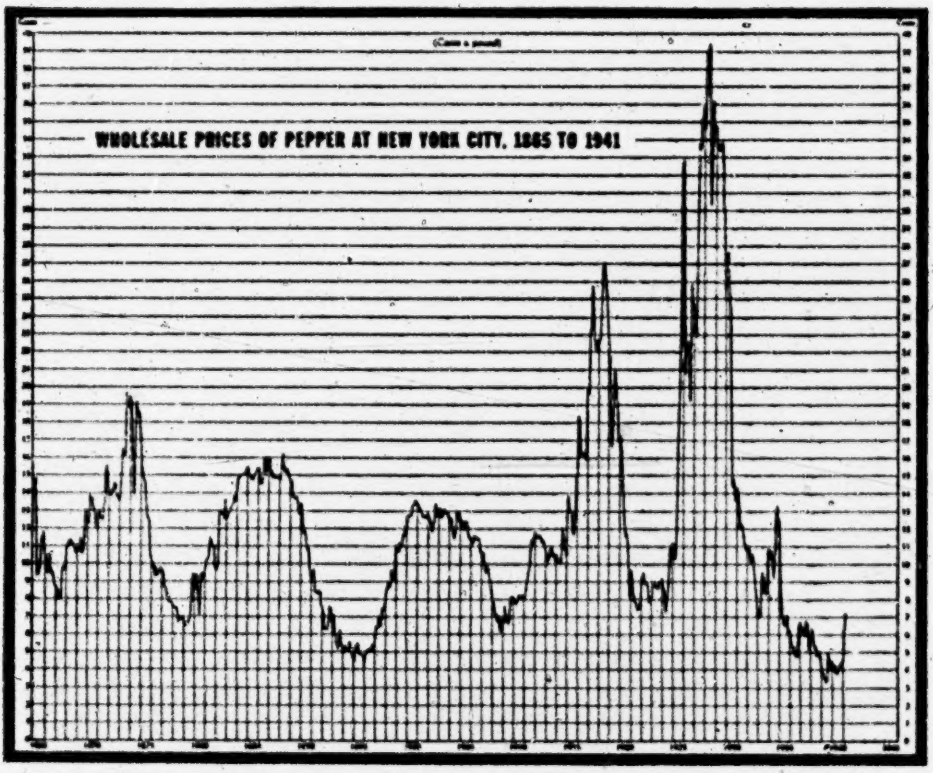
	Cents		*Cents*
1936	5.5	1939	4.0
1937	6.1	1940	4.1
1938	5.4		

During the year 1941, through the month of November, the average monthly prices, expressed in cents per pound, had been:

	Cents		*Cents*
January	4.1	July	5.9
February	4.5	August	6.1
March	6.2	September	6.0
April	6.3	October	5.8
May	6.9	November	5.8
June	5.8		

During the first week of December 1941, the average daily price was 5.78 cents a pound.

There is set forth below a graph showing the range of wholesale prices of pepper from 1865 to 1941:



The average price of Lampong black pepper over a period of 50 years preceding the war was 13½ cents per pound.

10. The ceiling price of 6.75 cents a pound for whole black pepper was approximately the fair market price as of December 11, 1941.

11. During the period immediately subsequent to the issuance of the price schedule of 6.75 cents per pound, and prior to February 3, 1942, prices for Lampong type whole black pepper did not reach 6.75 cents per pound, the price established as the maximum by the price schedule. During the month of January 1942, for example, the highest
31 daily price was 6.45 cents per pound, with the average for the month of 6.41 cents per pound. These sales were made by certain traders in pepper, importers, and grinders, particularly those who held smaller lots because they realized it would be impossible for them to obtain a greater price than the ceiling, and therefore they sold rather than hold the pepper indefinitely and incur the cost of holding. There were large stores of whole black pepper

in the country at the time of the imposition of the 6.75-cent ceiling price.

12. On February 3, 1942, the Office of Price Administration amended this price schedule, reissuing it on that date as Revised Price Schedule No. 52. Under the schedule as amended the ceiling price of Lampong type whole black pepper was set at 6.50 cents per pound, plus labor charges paid the warehouse for putting the pepper in storage and taking it out, and plus warehouse storage charges for not more than 30 days.

The aggregate of these charges would, on the average, raise the ceiling price for pepper which had been in warehouse for 30 days or more to about 6.63 cents a pound.

Under this same price schedule it was provided that the maximum price for pepper sold for export exceed the domestic price by no more than ten percent.

13. On May 8, 1942, the War Production Board issued two orders entitled Conservation Order M-127 and Supplementary Order M-127-a, to conserve the supply of certain spices, including black pepper, by restricting their sale and delivery. Under these orders, deliveries of black pepper by packers and receipts of black pepper by wholesalers and industrial users, were limited to 100 percent of their average monthly deliveries or receipts during the year 1941. By Supplementary Order M-127-a, issued by the War Production Board on September 25, 1942, this quota was reduced for the last three months of 1942 to 90 percent.

By Executive Order 9280, issued by the President on December 5, 1942, the authority to exercise priority powers with respect to food was transferred from the War Production Board to the Secretary of Agriculture. Pursuant to this delegation of authority, the Secretary of
32 Agriculture on February 8, 1943, issued an order known as Food Distribution Order 19, entitled "Conservation and Distribution of Spices." This order, among other things, delegated to the Director of Food Distribution the authority to establish quotas for the delivery, receipt and use of "restricted spices," including black pepper. This authority was exercised by the Director of Food Distribution on the same day by the issuance of Food Distribution Order 19-1, establishing a quota on the delivery, receipt and use of black pepper during the first quarter of 1943, and during each succeeding quarter unless otherwise authorized, of 90 percent of the amount delivered, received or used during the corresponding quarter of 1941. By amendment to

Food Distribution Order 19.1 issued on April 26, 1943, this quota was reduced to 60 percent for the second quarter of 1943 and succeeding quarters, and by amendment issued February 29, 1944, this quota was further reduced to 40 percent for the first quarter of 1944 and succeeding quarters.

14. Notwithstanding the foregoing measures taken to conserve this country's supply of black pepper, the inventory in the hands of importers had been reduced to about 28,000,000 pounds on September 30, 1943, of which approximately 17,000,000 pounds were held by Commodities. Between that date and the date of the requisition on May 26, 1944, very little whole black pepper was sold out of these inventories.

15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impractical because of war conditions.

16. There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol.

33

17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months.

18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was

made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.

This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound.

19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October. Prior to increasing the ceiling price, the Office of Price Administration and the Department of Agriculture had obtained an informal agreement from Commodities to sell about seven million pounds of its pepper at the 10-cent price, and after the price was so increased in October 1944 Commodities did sell approximately seven million pounds of pepper at that price.

In March 1946, following similar negotiations between Commodities and the Government, the ceiling price of whole black pepper was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of pepper, amounting to about three million pounds, at that price.

34 These increases were made in order to obtain a distribution of pepper which was not obtainable at the lower ceiling prices, and were made only after negotiations by the Office of Price Administration with Commodities and other dealers in pepper, to the end that large quantities of pepper would be sold upon such increase in ceiling price.

20. In June 1945 plaintiffs, Commodities and Irving Trust Company, sold approximately 124,000 pounds of whole black pepper to consignees at Puerto Rico. There were various sales at an average price of 14.19 cents a pound.

The 10 cents ceiling price was still effective in the United States, including Puerto Rico, but the regulations provided that the exporter could charge his usual prewar export markup, plus 25 percent of that markup in addition to the ceiling price. These sales were alongside steamer at New York and did not include freight.

21. On October 4, 1943, Commodities had filed a petition seeking amendment of price schedule 52 relating to pepper.

The amendment desired was the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of 1/24 cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date of this amendment shall have been owned and stored by him."

By letter dated March 11, 1944, the Price Administrator denied this petition.

22. On or about October 25, 1943, Commodities received a request from the War Department for a quotation on one million pounds of whole black pepper. It replied under date of November 1, 1943, as follows:

> Replying to yours of October 25th, this company is not desirous of making any sales of black pepper whatever at this time and it is unfamiliar with the Federal specifications referred to in your letter.
>
> However, if the Army is in need of pepper we will offer to sell you, subject to obtaining prior approval of the O. P. A., under procedural regulation No. 6, by amendment to R. P. S. No. 52, or by any other properly authorized approval, 1,000,000 pounds of our Lampong whole black pepper at 9¾¢ per lb., which is less than the average investment cost to this Company, including carrying charges, of the Lampong whole black pepper which it now holds.

On or about November 8, 1943, Commodities filed with the Office of Price Administration an "Application for Adjustment of Maximum Prices for Commodities or Services Under Government Contracts or Subcontracts." In this application Commodities stated that it had sold 2,300 tons of whole black pepper during the early part of 1942, closing out future contracts that it had entered into on the New York Produce Exchange in 1941, and that between January 1, 1943, and the date of the application it had sold 98,267 pounds of whole black pepper for $6,387.36, or an average of 6.5 cents a pound. It requested approval of the unit price of 9¾ cents a pound on the proposed sale of one million pounds to the War Department. No formal action was taken on this application by the Office of Price Administration since, while the matter was still pending before it, and on or about December 7, 1943, the pepper in question was requisitioned by the War Department. This requisition is now the subject of litigation in this court in *Commodities Trading Corporation* v. *United States*, No. 47588.

23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		*Cents*
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

36 However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper.

24. The pepper requisitioned by the Government in May 1944 is identified by lot numbers from purchasers by Commodities from October 1933 to January 1936. Commodities purchased this pepper at various times during the above period, the purchases amounting to 5,805 bags or 773,201 pounds net, at an invoiced cost of $53,143.13, or an average of $0.0621046 per pound.

The pepper requisitioned by defendant in May 1944, had been carried by plaintiff for periods averaging 9 years and 4½ months. The total cost of the pepper to Commodities is as follows:

	Pounds	*Per Pound*	*Total Cost*
Original cost	773,201.00	$0.0621046	$53,143.13
Shrinkage	13,450.12		
Cost of pounds delivered in May 1944	759,750.88	.069948	53,143.13
Carrying charges:			
Labor, handling at (average) per bag of .04422			$ 256.71
Cartage, etc., at (average) per bag of .076			442.31
Storage, at (average) per bag per month of .03			19,591.62

Bank interest, commissions, cables, exchange, etc., amounting to approximately 2.75% per annum	13,672.99
Insurance, at premiums of approximately $4.368 per $100 value for 9 years 4 months	3,377.34
Taxes, on basis of average stored pepper during period 1936 to 1943 inclusive	1,076.67
Total direct costs	91,560.77
Allowance for general administrative expenses at 1% per annum during carrying period, of 9.33% on original cost of $53,143.13	4,958.25
Total costs plus estimated administration expense, or an average cost per pound of $0.127	96,519.02

The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses
37 to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs.

25. Whole black pepper is not perishable and will last unimpaired in quality for several decades.

26. The pepper vine which produces Lampong pepper is planted in Sumatra on land cleared out of the jungle. The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines. The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942. If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear.

This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States.

27. The fair value of 759,750.88 pounds of pepper, the subject of this action, was on May 26, 1944, the sum of $113,962.63, or 15 cents a pound.

28. Plaintiffs, Commodities and Irving Trust Company, were paid on November 27, 1945, the sum of $26,404.14, which represented one-half of the award made by the Acting Under Secretary of War on September 26, 1945, or the sum of $25,133.38, plus one-half of additional compensation for delay in payment, or the sum of $1,270.76.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the Commodities Trading Cor-
38 poration, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63), plus compensation for delay in payment computed at four (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14), and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid.

From the amount awarded the lien of plaintiff Irving Trust Company shall first be satisfied, and the balance shall be paid to the distributees of the Commodities Trading Corporation named in finding 1 in accordance with their respective interests as therein set out. Judgments are rendered accordingly.

Opinion

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue the defendant for what they deem just compensation for the requisition on May 26, 1944, of 759,750.88 pounds of whole black pepper. Plaintiffs claim that 22 cents a pound is just compensation. The defendant

allowed them $50,266.76, plus an amount for delay in payment. The amount allowed was computed at 6½ cents a pound, which was the ceiling price established by the Office of Price Administration.

We are of the opinion that this ceiling price is not the measure of just compensation in this case. Pepper is not perishable; it can be stored for many years without deterioration. This is an essential difference between this case and the case of *United States* v. *Felin*, 334 U. S. 624.

In that case three justices of the Supreme Court expressed the opinion that the ceiling price was the measure of just compensation for the requisition of perish-
39 able goods. Two justices were of opinion that this was not the measure of just compensation, and four justices expressed no opinion on this subject one way or the other. Mr. Justice Reed, who wrote the concurring opinion in which the view was taken that the ceiling price was the measure of just compensation, made it plain in his opinion that they were dealing in that case with perishable property. In the following quotation from his opinion we have underscored his use of the word "perishable":

> It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their *perishable* property to the general public at a fixed price or not to sell to anyone[1] and later to hold that the Government must pay a higher price than the general public where it requisitions the *perishable* property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of "just compensation." That lawfully fixed market price determines what the *perishable* article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain

[1] See *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

since consequential damages for loss of good will cannot be obtained. Such maximum price is "just compensation."[2]

Even if the ceiling price is the measure of just compensation for perishable property, we do not think it can be said to be the measure when nonperishable property is requisitioned. This is so because the owner of nonperishable property has the right to hold it until after restrictions are removed, and then sell it. He is not required to sell at the ceiling price, whereas the owner of perishable property must sell at the ceiling price or let his property perish.

40 We have several times held that, in determining just compensation, we must take into account the plaintiff's right to hold its property until restrictions on its disposition are removed. *Seven-Up Bottling Co.* v. *United States*, 107 C. Cls. 402; *Kaiser* v. *United States*, 108 C. Cls. 47; *Adler Metal Products Co.* v. *United States*, 108 C. Cls. 102; *Pantex Pressing Machine Co.* v. *United States*, 108 C. Cls. 735.

The Government in time of war has the undoubted right to say to the citizen, if you want to sell your property you must not sell it for more than a certain price; but the Government has no right to take the property and pay for it no more than this fixed price, unless that price justly compensates the owner, taking into consideration his right to hold his property until he can get for it whatever anyone is willing to pay.

This so-called "retention value" is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper; it was rather an investor in pepper. It began buying pepper in 1933, and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it.

There is set forth in finding 9 a graph showing the rise and fall in the price of pepper over a period of about 75 years. This shows a marked fluctuation in the price of it in fairly regular cycles. There is a good reason for this. Practically the entire supply of pepper comes from Sumatra, French Indo-China, and India. The pepper vine grows in the jungle. Before planting, the jungle must be cleared

[2] Cf. *Nortz* v. *United States*, 294 U. S. 317, 328-29.

and it must be kept cleared. When prices are high the natives plant pepper; but when prices decline, they neglect their vines and allow them to be destroyed by the encroachment of the jungle. The resulting scarcity causes the market to rise. Prices stay high for several years because it takes about 4 years for a pepper vine to bear.

Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it
41 until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition. As it turned out, the price of pepper shot up to more than 40 cents immediately after restrictions had been removed, and it went on up to 75 and 80 cents.

A very great increase in price was inevitable upon the removal of restrictions. The price of pepper had greatly declined beginning in 1935 and 1936, and was still down when the ceiling price was fixed. This resulted in but little planting and in the neglect of the growing vines, which resulted, in turn, in a scarcity. In addition to this, the Japanese invasion of Indo-China and Sumatra further reduced the supply. These factors made it inevitable that there would be a very great increase in the price after restrictions were removed. Had plaintiffs' pepper not been requisitioned there was no doubt they could have continued to hold it and could have gotten for it a price far in excess of the ceiling price fixed by the Office of Price Administration.

The determination of what is just compensation for the taking of this pepper is extremely difficult. It must be determined as of the time of the taking, and at that time there was no free market; in fact, no pepper was offered for sale in the United States during the year 1944, in which year it was requisitioned, until in October of that year when the ceiling price was increased from 6½ cents to 10 cents a pound. Prior to October 1944 Commodities, who had about 17,000,000 pounds of pepper, which was more than one-half of the total supply in the country, had agreed with the Office of Price Administration that it would put on the market 7,000,000 pounds of its pepper if the price was increased to 10 cents. When the market was increased to 10 cents, Commodities sold some 7,000,000 pounds, as it had agreed to do.

Later, in the spring of 1946, the ceiling price was further raised to 16 cents, and Commodities sold its remaining stock at this price.

The sales at 10 cents a pound by Commodities were not made from choice, but rather because the Government had made strong representations to Commodities that it should not withhold from the market its supply of pepper. Sales at this price were below cost. Our finding 24 shows
42 that the average cost to Commodities by the spring of 1944, including labor cartage, storage, interest, insurance, taxes, and a small allowance for administration expense, was 12.7 cents. We do not think that the price of 10 cents, at which Commodities sold some 7,000,000 pounds, is the measure of just compensation.

However, in June of 1945 Commodities apparently voluntarily sold in Puerto Rico 124,000 pounds at an average price of 14.19 cents a pound. This was after the requisition, but since we are undertaking to arrive at the "retention value" of the pepper, we think it and certain other transactions occurring after the requisition are relevant.

Taking into consideration Commodities' costs and the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed, and also these sales at 10 cents, at 14.19 cents, and at 16 cents, we conclude that 15 cents a pound is just compensation. This allows plaintiff a little more than 2 cents a pound profit, and is 1½ cents a pound higher than the average price at which pepper had sold over the last 75 years.

The Commodities Trading Corporation was dissolved on January 7, 1946, but under the laws of the State in which it was incorporated it is empowered to continue to exercise the corporate powers necessary for the winding up of its affairs. Under the plan of dissolution the assets of the corporation, including this claim against the United States, were distributed to the stockholders, whose names appear below in the fractional parts set opposite their names:

William T. Hunter—385/11,000ths.
David S. Hunter—473/11,000ths.
Ruth H. Colby—473/11,000ths.
Alice D. Hunter—473/11,000ths.
Elizabeth H. Stevenson—473/11,000ths.
Marion H. Shutt—473/11,000ths.
Frederick D. Trismen—1374½/11,000ths.
Edward L. Blackman—1375½/11,000ths.

William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Katharine Pyle Cole, dated 12/5/36—550/11,000ths.

43 William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Katharine Cole (Jr.) dated 12/5/36—550/11,000ths.

William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Philip Gillett Cole, Jr., dated 12/5/36—550/11,000ths.

William T. Hunter, Earl A. Darr, and Philip Gillett Cole, Jr., as Successor Trustees under Declaration of Trust for Jane Rulon Cole, dated 12/5/36—550/11,000ths.

William T. Hunter, Philip Gillett Cole, Jr., and Dwight M. Mills as Trustees of Trust created under Paragraph 12 of the Last Will and Testament of Philip Gillett Cole, Deceased—3300/11,000ths.

At the price of 15 cents a pound, the stockholders of the Commodities Trading Corporation, named above, are entitled to recover the sum of $113,962.63, plus compensation for delay in payment computed at 4 per cent annum on $113,962.63 from May 26, 1944 to November 27, 1945, less the amount paid plaintiffs on the latter date of $26,404.14, and plus a further sum for delay in payment computed at 4 per cent per annum on $88,829.25 from November 27, 1945, until paid.

The foregoing judgment will be distributed to plaintiffs in proportion to their respective interests as set forth above, subject to the lien of plaintiff Irving Trust Company for whatever balance remains at the time of settlement. This balance will be paid to the Irving Trust Company.

HOWELL, *Judge;* and LITTLETON, *Judge*, concur.

Dissenting Opinion

MADDEN, *Judge*, dissenting.

I am unable to agree with the court's decision. We have here, apparently, the naked question whether a ceiling price for a commodity, which ceiling price was lawfully imposed by the Government, is the proper measure of just compensation for that commodity, when some of it is taken by the Government for public use. I think it is the proper measure.

On December 11, 1942, the Government imposed a
44 ceiling price of 6.75 cents per pound on whole black pepper of the kind herein involved. There was then an enormous supply of such pepper in the country, and the market price was lower than the imposed ceiling. On February 3, 1942, the ceiling price was revised to 6.50 cents per pound, plus certain warehouse and labor charges. During the period when the first ceiling price was in effect, the market price was lower than 6.50 cents per pound. This would seem to show that the new ceiling price was reasonable, and this was probably why the plaintiff, Commodities Trading Corporation, which owned a large fraction of all the whole black pepper in the country, did not resort to the Emergency Court of Appeals, which was, by Section 204 (d) of the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 32, 33; 50 U. S. C. Appendix 924 (d), given exclusive jurisdiction to review the legality of price ceilings. The ceiling price then became the maximum lawful market price. Many millions of pounds of pepper were sold by private owners to private buyers, and at that price. The plaintiff chose not to sell any of its pepper. By September 30, 1943, the total supply in the country in the hands of importers was down to about one-third of what it had been when the 6.50 cents ceiling was imposed in 1942. No doubt this reduction of supply would have resulted in a greatly increased price in an uncontrolled market. But the market, in pepper, and in most other commodities, was not uncontrolled. If, in the changed circumstances, there was something unlawful about keeping the same ceiling price that had been imposed earlier, there was, I suppose, a new opportunity to resort to the Emergency Court of Appeals for relief. The plaintiff did not resort to that court. In May of 1944 the War Department requisitioned a small fraction of the pepper which the plaintiff owned, and in settlement offered the ceiling price for it, which price the plaintiff rejected as being less than just compensation.

We do not have here a case where the Government, with a view to taking, or diverting to its own use, the whole supply of a commodity, first sets a ceiling price and then requisitions the property. The ceiling price here in question was imposed upon a commodity in general use, and of which the Government ultimately took only a relatively small quantity. In the numerous sales and purchases be-
45 tween private persons, the ceiling price was the market price. It was not a free market, any more than

the market for steel or wheat or gasoline or shoes was a free market. But it was the market, and was as lawfully the market as is a market strongly affected by custom duties or excise taxes or railroad rates or other governmentally imposed conditions. For one citizen to sell to another at a price above the ceiling was made a criminal offense. Yet, the court decides, if the Government itself needs for a public use, such as to feed the Army, some of the commodity, it is constitutionally required to ignore the control which it has imposed to prevent the public economy from being destroyed, and must discriminate against those who obeyed its law and let their goods go into the channels of trade, by paying to the ones who held their goods out of the market some two and one-half times as much as the price at which other persons sold their property. I get the impression from all this that the basic though unconscious philosophy must be that control of prices in wartime is really beyond the power of the Government, yet must be tolerated because it would cost many billions to compensate all those who are financially harmed by the controls. Since it costs considerably less to pay the relatively few persons whose property is requisitioned by the Government, not the price which in fact, their property would have brought in the market, but the price which they would have been able to get if the scarcities resulting from the war had existed and the controls made necessary by the war had not existed, they are given that artificial and speculative price. The result of this discrimination against those who let their products flow into the channels of trade in wartime, in spite of the necessary controls, will be to encourage hoarding in the hope that the Government's necessities may compel it to take the property by requisition.

I would hold that the amount awarded to the plaintiffs for their pepper was just compensation. The decision of the Circuit Court of Appeals for the Seventh Circuit, in *United States* v. *Sanitary District of Chicago*, 149 F. 2d 951, was, as I read it, in accord with what I would decide.

JONES, *Chief Judge*, took no part in the decision of this case.

47 *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 4th day of April, A. D., 1949, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the Commodities Trading Corporation, or its distributees are entitled to recover.

It is Therefore Adjudged and Ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63), plus compensation for delay in payment computed at four (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14), and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid.

From the amount awarded the lien of plaintiff, Irving Trust Company shall first be satisfied, and the balance shall be paid to the distributees of the Commodities Trading Corporation named in finding 1 in accordance with their respective interests as therein set out. Judgments are rendered accordingly.

49 *Proceedings after Judgment*

On May 20, 1949, the defendant filed an application for transcript of record on petition for writ of certiorari, together with the such additional parts of the record, to be certified.

On May 31, 1949, the plaintiff filed additional portions of the record proposed for certification, as requested by plaintiff.

On June 22, 1949, the court filed an order settling and approving the transcript of record as follows:

Order Settling and Approving Transcript of Record on Petition for Certiorari.

The within transcript prepared from the original record in this court in the above-styled case having been proposed in part by defendant and in part by plaintiff as that portion of the record material to the errors assigned in the petition of defendant and plaintiff for writ of certiorari,

and such transcript having been considered and found to be an accurate statement of the portions of the original record material to the errors assigned, the same is, this 22nd day of June, A. D., 1949, hereby settled and approved.

By the Court
Marvin Jones
Chief Judge

51 Other parts of the Record Deemed by Defendant and by Plaintiff to be Material to the Errors Assigned Accompany this Record under Separate Cover.

53 Clerk's Certificate to foregoing transcript omitted in printing.

In the Supreme Court of the United States

54 *Stipulation as to Printing Record*

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

(1) Respondents' petition in the Court of Claims.
(2) General traverse.
(3) Supplemental petition.
(4) General traverse to supplemental petition.
(5) Argument and submission of the case.
(6) Special findings of fact, conclusion of law; and opinion of the Court of Claims, including the dissenting opinion of Judge Madden.
(7) Judgment of the Court of Claims.
(8) Proceedings after judgment.
(9) Clerk's certificate.
(10) This stipulation.

It is further stipulated and agreed that in the event that the petition for a writ of certiorari is granted, the printed record shall consist of the foregoing and such additional portion of the record certified by the Court of Claims as the parties may designate.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record

55 filed in the Supreme Court of the United States, including any part thereof which has not been printed.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General
Counsel for Petitioner

EDWARD L. BLACKMAN
Counsel for Respondents

☆ U. S. GOVERNMENT PRINTING OFFICE 84603 O—49 No. 9 1949

[fol. a] **IN THE UNITED STATES COURT OF CLAIMS**

[Title omitted]

Additional Portions of Record Designated by Defendant—
Filed May 20, 1949

1. TRANSCRIPT OF TESTIMONY

(p. 358)

MURRAY SQUIRES, a witness produced on behalf of the defendant, after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Barnes:

1 Q. Mr. Squires, will you please state your full name?
A. Murray Squires.
2 Q. And what is your age?
A. I am 43.
3 Q. And what is your occupation?
A. I am a green coffee broker representing foreign shippers.

[fol. b] (p. 359)

8 Q. Mr. Squires, were you formerly connected with the Office of Price Administration?
A. Yes, I was.
9 Q. During what period of time?
A. From April 20, 1942, to January 10, 1947.
10 Q. During that period, did you have any connection with the price ceilings established by the Office of Price Administration on whole black pepper?

* * * * * * *

A. During the period from April 20, 1942 to approximately the middle of 1943, I was in charge of green and roasted coffee only. Subsequent to that date I became interested in the enforcement and establishment of prices on black pepper.

* * * * * * *

(p. 368)

43 Q. Mr. Squires, when was the first formal protest received from any person as to the level of ceiling prices which were established for whole black pepper?

Mr. Blackman: Objected to as irrelevant and immaterial and not within this witness' knowledge.

A. My recollection of this is that it was filed October 4, 1943.

[fol. c] Mr. Blackman: By Commodities Trading Corporation?

(p. 369)

The Witness: By Commodities Trading Corporation.

(p. 371)

50 Q. To clarify this a little bit, would the document which you refer to as the formal reply, Mr. Squires, be the

(p. 372)

letter signed by the Administrator of the OPA which was mailed to the plaintiff on March 11, 1944?

A. Yes, that is the official document denying the petition.

51 Q. And you have a copy of that letter there in front of you?

A. Yes, I do.

Mr. Barnes: I would like to offer this in evidence as "Defendant's Exhibit 3."

(Whereupon, the document offered in evidence was marked by the reporter "Defendant's Exhibit 3.")

(p. 374)

56 Q. Did Commodities Trading Corporation appeal from this rejection to the Emergency Court of Appeals?

A. I don't recall.

Mr. Blackman: We did not.

[fol. d] Copy

DEFENDANT'S EXHIBIT 3

Helen R. Dirtrich

Mailed March 11, 1944.

Commodities Trading Corporation
80 Broad Street
New York, New York

Re: Petition for amendment to RPS 52—Pepper. Docket No. 3052-2

Gentlemen:

Your petition for amendment to RPS 52, filed October 4, 1943, has been given careful consideration in this Office. I regret to inform you that it must be denied.

Your petition shows that your proposed amendment is essentially designed to bring about an increase in the maximum price of Lampeng Black pepper owned by you. You state that you are not a dealer in pepper in the ordinary sense but that you hold 17 million pounds, large inventories of which you began to acquire in 1933 and the supply of which you have kept up, making a few sales and a few purchases over the intervening years prior to price control. You contend that the present ceiling price is substantially less than your actual investment in the pepper including carrying charges. You specifically request that by amendment provision be made to add to the present maximum price the cost of actually putting the pepper into warehouse plus 1/24 of 1 cent per pound per month for the average number of months beyond one month during which the pepper held by you at the date of the proposed amendment, shall have been owned and stored by you.

In considering your proposed amendment and after a meeting with your representatives and others engaged in the pepper trade, an accounting study of your inventory was made. While it appears that in your petition you evaluated your inventory on the basis of purchases and sales of particular lots, the accountants from this Office also made an evaluation on the basis of "first in" and "first out". In that method of evaluation the invoice costs were taken from your purchase records and are based upon actual landed

weights with all charged paid into storage. The sums used in the evaluation for storage, insurance, interest and weighing out represent estimated costs computed at the actual rates paid for the services rendered. Loss of weight for the entire inventory was computed at the actual rate of losses suffered on that pepper delivered by you to the U. S. Army on December 7, 1943.

On this basis of evaluation the estimated cost of your inventories on February 3, 1942 is found to be $.055156 per [fol. e] pound. It would appear that sales might have been made by you on that date at the ceiling price of 6.5¢ per pound ex dock plus permissible charges or 6.63¢ per pound which would have afforded you a gross margin of profit of 20-35/100 per cent. As to sales which ~~might have been~~ made on October 4, 1943, the date of the filing of your petition, it has been estimated that the additional carrying charges from February 3, 1942 to October 4, 1943 would have been $.006232 per pound, and the above gross margin of profit would be reduced by 8-13/100 per cent. Stated in another way your margin of profit for sales at the ceiling price on February 3, 1942 would have been $.0112 or 16-92/100 per cent and on October 4, 1943, $.0049 or 7-53/100 per cent. In view of the fact that the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942 appears as fair and equitable to you. Furthermore, you realize that the regulation was designed to take care of the industry as a whole and at the time of its issuance it was found to be generally fair and equitable. Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to purchase since the issuance of the regulation. Under all these circumstances it has been determined that it would be unfair to give you the increase in maximum prices which you request.

Again, I wish to assure you that your petition has been denied only after the most careful consideration.

Sincerely, Chester Bowles, Administrator.

RFrazier:hf.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

Additional Portions of Record Designated by Plaintiffs

1. TRANSCRIPT OF TESTIMONY

(p. 2)

ISIDOR B. KATZ, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Blackman:

Q. 1. Mr. Katz, what is your business?

A. Import and export business, principally foodstuffs.

Q. 2. Do you do business individually or as a partnership or firm?

A. As a corporation. I am president of the Katz American Company, Inc.

[fol. 2] A. I established this company here thirty years ago, so I was immediately officer and president from its start.

(p. 3)

A. I have branch offices in Indonesia, Cuba, Brazil, and an associate company in Holland, where I really originally came from.

[fol. 3] Q. 12. Have your dealings in spices included dealings in Whole Black Pepper?

A. Yes, sir.

Q. 13. What kinds of black pepper have you dealt in?

A. All kinds, principally Lampong.

Q. 14. Where is that produced?

A. Sumatra.

Q. 15. Anywhere else?

A. No.

(p. 4)

Q. 16. Where are the other kinds of pepper produced?

A. You have pepper coming from French Indo-China, which is called Saigon pepper. You have pepper coming

from British India, which is called Malabar pepper, Alleppy and Tellicherri.

Mr. Rood: Those are three kinds?

The Witness: No, the Malabar is divided into those two kinds. We call it either Malabar as a general name, or divide it into Alleppy or Tellicherri.

Q. 17. How do those peppers compare one with the other so far as quality and so far as price are concerned?

A. The pepper coming from British India in general is a little cleaner and grinds a little lighter than the pepper coming from other places, but the difference is very small. The reason is that in British India they wash the pepper and get all the dust out, whereas in the other districts they still leave a little bit in.

[fol. 4] Q. 18. How about the price?

A. The price varies. Sometimes the price of British India is higher; at other times it is not.

Q. 19. When you say the price is higher, how much higher is it? What spread is there customarily?

Q. 19. (Continuing): Price wholesale in New York City.

A. Price wholesale in New York City, there is very little difference.

Q. 20. What kind of pepper is used almost entirely in New York City and in the United States?

A. The Lampong black pepper is by far the largest quantity.

Q. 21. Have you bought and sold pepper in the countries you have mentioned over a great many years?

A. Yes, sir.

Q. 22. Continuously and up to the present time?

A. Over the entire world.

[fol. 5] Q. 33. Has it been necessary for you in the conduct of your business to be familiar with the prices of Whole Black Pepper in various parts of the world?

A. Yes, sir.

Q. 34. In what part?

A. Everywhere.

Q. 36. What are the principal trading centers for Whole Black Pepper and what have been such principal trading centers during the last thirty years?

(p. 7)

A. Before the first World War, 1914, the principal trading centers were in London and Rotterdam, Amsterdam.

When the first World War came those trading centers were changed on account of the fact that Europe was cut off to some extent from the Orient, and consequently the market at Singapore and Batavia and New York came in much nearer connection to each other. Therefore, the trading center of Europe was changed to Batavia, Singapore and New York.

Q. 37. What is whole Black Pepper? Just describe it.

[fol. 6] A. Whole black pepper is the berry of the pepper vine.

Q. 38. Is it the natural state in which the pepper is produced before anything is done to it?

A. No. The berry grows on the vine just like grapes grow in bunches, and then when the fruit is ripe, they are taken off and they are dried, mostly in the sun, and then you get your black pepper.

Q. 39. That is what we call Whole Black Pepper?

A. That is right.

* * * * * * *

[fol. 7] (p. 14)

Q. 60. Was the ceiling price that was fixed for Whole Black pepper ever withdrawn entirely?

A. Yes, sir.

Q. 61. When?

A. Yes, sir, in August of this year; August 1946.

Q. 61. Since that ceiling has been removed was there an active market in Whole Black Pepper in the City of New York and throughout the United States?

A. Yes, sir, although not too big, because the stocks were very small, but there was not a regular open market then.

Q. 62. What is the market price in New York today?

(p. 16)

A. The price for spot pepper today is around 80 cents per pound, whereas you can buy pepper which is afloat or coming in the near future at all prices from 40 to 80 cents.

Q. 63. What was the market price immediately following the lifting of the ceiling in August?

[fols. 8-9] A. The spot price in New York for immediate delivery was around 50 to 60 cents per pound.

Q. 64. Is Whole Black Pepper, including Lampong Black pepper, consumed in other parts of the world besides the United States?

A. Yes, sir.

(p. 17)

Q. 65. In what countries?

A. All over the world.

Q. 66. What was the situation in the world outside of the United States with respect to supplies of Whole Black Pepper during the year 1944?

A. Pepper was very scarce everywhere.

* * * * * * *

[fol. 10] Q. 76. Was there any physical obstacle for getting pepper from the United States to these South American countries in 1944.

A. The only pepper that could be exported was with an export license.

[fol. 11] Q 81. That is, the United States undertook to supply or to permit the supply of certain quantities of pepper to these South American countries?

A. Yes, sir.

Q 82. Were there restrictions on the price at which that pepper could be sold?

A. By the exporter, yes. By the buyer in the foreign countries, no.

Q 83. What was the result of that situation? Did you sell pepper down in Brazil at the price fixed by the O. P. A. for export pepper?

(p. 21)

A. Yes, sir. I may say, if you allow me to give you a description of my recent trip, I was just last August in Brazil, and one man jokingly told me, he said "You people [fol. 11½] in New York have enriched the grocery trade of Brazil to a very large extent with the supplies of pepper which you have given to this country."

[fol. 12] Q 88. You stated that a large amount of pepper was produced in India, I believe?

A. That is correct.

Q 87. Is India the next largest producing country of black pepper next to Sumatra?

A. Yes, sir.

(p. 26)

A. The price fluctuated during that year 1944 in India from 22 cents high—do you want to have them by months?

Q 98. By months.

A. I have here quotations on different dates: February, 21¼, and 22.10 for Tellicheri pepper, that is the other.

I had better stick to the Alleppy black, which is the cheapest.

March, 21.20. April 18.55 to 19.

C. i. f. New York. That is, cost, insurance and freight paid to New York.

At cents per pound, yes.

The Witness: I am stating the price at which India was offering pepper for shipment to New York during that period. We as importers—if I may qualify—I say, we as importers, if there had been no restrictions such as ceiling prices and as far as import regulations were concerned, you would have bought at that time from India one hun- [fol. 13] dred per cent at those prices, freight paid New York. The only expenses which we would have on that would be to remove the merchandise from the dock and put them again in the street.

Mr. Rood: You are stating that those were offerings in India which you know about yourself?

The Witness: Yes, sir.

Mr. Rood: But which were subject to obstacles, subject to obstruction by legal controls of the various governments?

The Witness: Only of the American Government.

Mr. Rood: No, you stated earlier that there was an obstruction in India.

The Witness: But I also stated that a few thousand tons were also put aside for the United States if we could have come together with the United States Government about the price.

(p. 28)

Q 99. When you said "we", you mean the import trade?
A. The import trade, sure.

Mr. Rood: And the only legal obstructions were obstructions of the United States Government, not the Government of India?

The Witness: Correct.

Mr. Rood: Or the Combined Food Resources Board.

The Witness: The Combined Food Board was willing to request a few thousand tons of pepper.

[fol. 14] A. (Continuing) Where was I. March. I said April 18.55 to 19.08. May, 20.99. June, same price. July, 19.71. August, 19.40. September, 16.90. October, 19.76.

Q 100. What is the price at which Indian pepper is being offered today?

A. 34 to 36 cents, c. i. f. New York.

Q 101. And for how long has that been the price?

A. For the last few weeks; that is, for shipment October-November, from British India.

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(p. 33)

Q 120. What was the reason, Mr. Katz, for that tremendous difference in price between an average of thirty-odd cents in the latter part of the last decade, or the 1920 decade, and the price of five cents or thereabouts that you gave for the latter part of the 1930 decade?

A. The reason was that in 1926 we have had the smallest crops of Lampong pepper in history. It just happened that I was out there in the Indies that year, and they had never seen such a small crop. And on account of that

(p. 34)

prices, of course, rose tremendously, and then plantation and production started to increase also tremendously, because the natives saw the wonderful price of 40 cents a pound, and that was very much tempting. So everybody [fol. 15] started to plant pepper trees, and on account of that we have suffered ten years later in a tremendous overproduction, which also was bigger than we ever expected.

Q 121. What was the effect of that overproduction on planting?

A. That, just as we had abnormally high prices in 1926, 1927 and 1928, we got abnormally low prices in 1936, 1937, 1938 and 1939.

Q 122. And as the abnormal prices from 1927 to 1930 produced a tremendously abnormal amount of plants, what was the effect of the abnormally low prices of five or six years ago, or six or eight years ago?

A. I should say that I cannot give you a full reply on that, because the war interrupted with our observation of that consequence. They started already to neglect, to some extent, and the replants were very much neglected during that period, but I have not been able to give you a full reply to that question on account of not having looked behind the curtain for about five years.

Q 123. Not having been able to look behind.

A. That is right.

• • • • • • •

(p. 36)

Q 128. You stated that ceiling prices were fixed for black pepper in December 1941. Were ceiling prices fixed for other spices at that time?

[fol. 16] A. No.

Q 130. Were ceiling prices fixed for other spices than black pepper later?

A. Yes, sir. In May, 1942.

Q 134. How did the ceiling price that was fixed for Lampong black pepper compare with the avearge price of Lampong black pepper over a long period of years, say

(p. 37)

thirty years or fifty years or seventy-five years?

A. The average price for Lampong pepper for fifty years preceding the war was about—I can look it up there, but I think I am right—was about 13½, whereas the ceiling was fixed at 6½, which is about fifty per cent below the average price of the last fifty years.

Q 135. Take the other prices of the other spices. Please name some of the more important of those spices?

A. Cinnamon, clove, mustard, ginger. I can go into large and small quantities. Cinnamon is one of the biggest. Then you have red peppers, nutmeg and mace. Paprika is also a rather fairly large use.

Q 136. How did the ceiling prices that were fixed for those spices compare with the average prices of those spices for a number of years prior to the war?

A. All ceiling prices were considerably higher than the average prices before the war. Certain articles like cinnamon went up as much as six or seven hundred per cent. Nutmeg, went up about four hundred per cent. Mace went up about one to two hundred per cent. I could go on that way, but I think that gives you an idea. Ginger went up two hundred per cent.

Q 137. Is that illustrative of what happened in the whole line of prices on spices?

A. Yes, sir.

* * * * * * *

[fol. 17] Q. 158. Do you know what the conditions were throughout the entire world with respect to supplies of Whole Black Pepper in March, April, May and June, 1944?

A. Yes, sir. Supplies were very small everywhere.

Q. 159. For how long had that been the case?

A. Since the East Indies became engaged in war with Japan and they were cut off from the rest of the world, which was in the early part of 1942.

The Witness: Everywhere, in all countries, the reserve stocks were very small and not sufficient for the consumption, because there was no replacement during the time of

(p. 46)

occupation by the Japanese.

Q. 160. At the time of the outbreak of the war, there were large stocks in the United States, were there not?

A. There were large stocks in the United States, yes. You spoke about other parts of the world.

Q. 161. Yes. The United States had nearly all the pepper there was?

A. By far the largest part, yes.

A. By far the largest part of all pepper which there was in the world.

[fol. 18] Q. 162. Mr. Katz, black pepper is not consumed generally by the person who actually consumes it in the form of Whole Black Pepper, is it?

A. It is ground.

Q. 165. In 1944, in March, April and May of that year, was it entirely feasible for a holder of Whole Black Pepper to realize ten cents or more for his pepper by perfectly legal means and without violating the O.P.A. ceiling?

(p. 47)

The Commissioner: You mean ten cents profit?

Mr. Blackman: Yes.

A. No. Ten cents sales price, do you mean?

Q. 166. Ten cents on the net sales price.

A. Ten cents on the net price, yes. For some of them, yes.

Q. 167. Please explain that.

A. Some people who had business in the grocery line could qualify as distributors of food products. The O.P.A. in the general regulations distinguishes between regular people who were just only importers or people who were also what they called distributors, and they had different price regulations for those.

[fol. 19] Any distributor could apply to the O.P.A. for the permission to sell the pepper in ground form.

As long as you asked the question, I think I might say that we applied for such permission and we did receive it

and were permitted to sell pepper in ground form instead of in whole form at that time, and in that way we could realize about ten cents per pound for our pepper.

Q. 168. And the ceiling price on ground pepper was approximately 12 cents or better?

A. That is correct.

* * * * * * *

Q. 173. Mr. Katz, what has been the effect of the World War and the Japanese occupation of Sumatra, upon the present capacity of the world to produce pepper?

A. The pepper production has suffered greatly. I do not know yet to what extent. The pepper vines in the East Indies have suffered. I do not know again to what extent. But, in any case, the production will be much smaller that it has been before the war.

[fol. 20] Q. 174. Is pepper a commodity which must be used within a reasonable period of time or will it keep indefinitely?

A. Whole pepper keeps indefinitely. Ground pepper should be used quicker.

Q. 175. You spoke a moment ago about the possibility of getting imports from India. Did you yourself actually

(p. 49)

obtain some Indian pepper within the last year or two?

A. Yes, sir.

Q. 176. Please state the circumstances.

A. As I said before, this country received allocations from the Combined Food Board for certain quantities of pepper from British India. As I also said, there have been lots of discussions about bringing in this pepper for domestic consumption, and we did not succeed in that in our different meetings in Washington on account of the fact that the price in India was higher than the price here. Finally, the Government was considering the idea of paying the difference in subsidies or any other way in order to bring it in anyhow.

So that part of the allocation was not used in those years. There was another part of the allocation, which was this time for the exporters who could sell in the Western Hemisphere, on account of the fact that our country had taken upon itself also the feeding of the Western Hemisphere with any of the food adequate.

The New York export trade had acquired during the years 1936 to 1939, a very large part of the export trade to [fol. 21] South America on account of the big market which we had here in New York; and consequently, the Combined Food Board recognized that if some of this pepper in British India was going to be released for South America,

(p. 50)

it should be distributed through the regular distributing channels, which was the New York export trade.

Consequently, where we were prevented—I mean, the trade was prevented—from making use of the Combined Food Board allocation for domestic consumption, inasmuch as the ceiling price was preventing—that there was nothing to prevent the bringing in of British Indian pepper, sell it to the exporters at the full market price in British India, and permit the exporters to resell it in South America.

As I stated before, the O.P.A. rules also limit the profit of the exporters, and for this merchandise the O.P.A. made an exceptional ruling and permitted the Government, in this case represented by the Commodity Credit Corporation, to buy this pepper in British India at the full market price in British India, to sell it to the exporter here at that same price, to permit the exporter to pay that price for that pepper at that full price, and then to permit that exporter also to sell that pepper in South America at any price which he was willing to sell it at. That pepper arrived here. That was bought by the Government——

Q. 177. When?

A. About 300 tons, and that was bought during the year 1945, and it arrived here and was distributed by the ex- [fol. 22] porters and shipped to South American countries.

(p. 51)

Q. 178. Did you take part in that transaction?

A. Yes, sir.

Q. 181. That is, based on the volume of business that you were doing before the war as compared with all the other exporters?

A. That is right. We had about 40 or 45 per cent.

Q. 182. What price did you pay the Government for that pepper?

A. We paid the Government 23½ cents for that pepper.

Q. 183. And what did you sell it for?

A. I do not know, I can't object against questions like that. It is really a trade secret, I should say. As long as it has been done—it was legal, of course; it was permitted by the O.P.A. The prices were between 36 cents per pound and one dollar per pound.

Q. 184. Did you get as much as one dollar for some of it?

(p. 52)

A. For some of it, yes.

[fol. 23] Q. 185. In South American countries?

A. Yes, sir.

Q. 186. Where they had no ceilings there?

A. Yes, sir.

Q. 187. Were there any changes in the conditions between May 26, 1944, and the time of this transaction that you speak of which would have made the price that you could obtain for pepper any lower in May than you actually got; would you have been able to do just as well in May 1944?

A. Yes, sir. As far as——

A. (Continuing:) I said yes, with some modification. I could have sold at 36 cents, which is, as I said, the minimum price which I could get for a large part of it in May 1944. The higher price which was obtained in some places may have been caused by the fact that—in fact, it was in

(p. 53)

Brazil, I may say, where the ceiling was in May 1944, 36 cents, and where the ceiling was removed at the end of 1944 on account of which in 1945 the prices in Brazil were [fol. 24] much higher than they were in 1944.

Q. 188. Were those things that you have just mentioned the only differences in conditions that in your opinion would have caused the difference in price between May 1944 and the time of this transaction which you mentioned?

A. Yes, sir.

Q. 189. In addition to this transaction that you have mentioned, was Indian pepper actually brought into the United States and sold in the United States?

A. Yes, sir.

Q. 190. Please state the circumstances of that.

A. The United States Government, or the Quartermaster's Department, needed additional pepper in the year 1945, after those lots in the beginning here were requisitioned, and the negotiations had been going on between the

Department of Agriculture who had the pepper business in its hands and the Quartermaster's Department and all other Government bureaus.

Then it was decided that the small stocks of pepper which were available still in the United States should not be used further by the Army. It should be kept for the moment; that it would be possible to distribute them in

(p. 54)

civilian life where it was highly necessary, to give pepper to the civilian population.

Consequently, the Department of Agriculture, with the assistance again of the Commodity Credit Corporation, bought in British India—and I do not know the exact [fol. 25] quantity—a certain quantity of several hundred tons of pepper, and the Army was going to hand over here to the grinders of pepper. The grinders had to grind them up for the Army and pack them in the regulation packing which the Army needs, and then the Army would use that for its own use. Also, that pepper was bought by the Commodity Credit Corporation at prices of around, let us say, between 21 and 23 cents. I have not seen their books, so I do not know exactly. I know only from what I was told in Washington.

When the war was finished, a certain quantity of this pepper—and I know it was a few hundred tons—arrived in the United States. The Army, of course, did not need it any more because the war with Germany at that time was over, and consequently the Department of Agriculture went back to the Army and obtained its permission to release that pepper for civilian consumption in the United States. The Department of Agriculture then permitted the grinders and manufacturers of this country to buy this pepper from them and use it for civilian consumption.

(p. 55)

Q. 191. What price did they permit them to buy it at?

A. I am not fully posted about that price, Mr. Blackman.

Q. 192. You did not take part in it?

A. I did not take part on that. It was direct from Government to the grinders.

Q. 193. That privilege was restricted to grinders?

A. That is right.

[fol. 26] Q. 196. What is the average annual consumption per capita in the United States of black pepper, or what was the consumption?

A. Before the war, it was about a quarter of a pound per capita.

(p. 56)

Q. 197. Does that include the amount that is used by the meat packers?

A. Yes, sir.

Q. 198. They used about how much of that?

A. Oh, it is difficult to say exactly, but in general we mostly say that the industry buys about half and that the housewife buys about the other half, if that is correct.

Q. 199. So that the individual consumption per capita in the home is about one-eighth of a pound?

A. That is correct.

[fol. 27] Q. 201. Well, what do these little containers that you speak of customarily sell for?

A. The pepper for the housewife is mostly sold in 2-ounce cans, 2-ounce containers. Before the war it was also sold sometimes in three ounces and four-ounce containers, but when it became a little scarce, the two-ounce container has been more predominant.

The price of the two-ounce container was in most retail stores ten cents, and remained ten cents for a very long period. Although really speaking, it could sell—in some of the chain stores who did their own grinding and did not

(p. 57)

have the jobbing mark-ups and the general mark-ups which others had, it could be sold as low as 6½¢.

A. (Continuing:) Then, of course, such a package—I am not familiar with the exact cost of the packing, because that is not my business, so I could not give you full information on that subject. One of the manufacturers might be able to give you better information there. But in any case you can understand that such a little two-ounce package containing only two ounces of pepper, contains a tremendous amount of labor. It contains a very large expense in the can itself, and the pepper itself is only a small part of the net cost value of such a can; and, therefore, any increase in the price of pepper does not increase the value of that [fol. 28] same can with the same percentage, but only with the percentage of the contents of the pepper itself.

Q. 202. As a matter of fact, those little cans customarily sold for ten cents over a long period of years

(p. 58)

without regard to what the price of pepper was?

A. That is right.

Q. 203. Is white peper consumed by the world as well as black pepper?

A. Yes, sir.

Q. 204. Is it consumed in the United States?

A. Yes, sir.

Q. 205. Is it a different product or does it come from the same plant?

A. It comes from the same plant.

Q. 206. There is just a little different treatment of the berry?

A. The skin is taken off before it is dried and then it is wiped.

Q. 207. Can the skin be taken off of black pepper and have it made into white pepper?

A. You mean the regular black pepper that we have here?

Q. 208. Yes.

A. It could, and it is done sometimes. Not as well when it is in fresh condition. In fresh condition it is much easier.

[fol. 29] (p. 59)

Q. 211. They decorticate the black pepper?

A. That is correct.

Q. 212. Change it into white?

A. That is right.

[fol. 30] William T. Hunter, a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Blackman:

Q. 1. Mr. Hunter, what is your business?

A. Manufacturing. I am a vice-president and director of the Scoville Manufacturing Company, Waterbury, Connecticut.

Q. 4. Are you an officer of Commodities Trading Corporation, one of the plaintiffs in this case?

A. I am.

Q. 5. What officer are you?

A. President.

Q. 6. How long have you been president?

A. About five years.

Q. 7. Prior to your becoming president were you an officer?

A. Vice President.

* * * * * * *

A. About eight years.

Q. 10. Does that go back to the formation of the company?

A. It does.

[fols. 31-32] Q. 13. What, if anything, did you have to do with the organization of Commodities Trading Corporation?

A. Well, I gathered friends prior to the organization and persuaded them to go into this venture.

Q. 15. Will you please state just what the object and scope of the venture was when it was entered into?

A. The object was to take a commitment in the commodity known as black pepper, with the purpose of eventually having a hedge against inflation.

Q. 16. Was the purpose to become regular dealers, like Mr. Katz or other persons in that business?

A. No, just take a commitment and hold that commitment as investors.

(p. 62)

Q. 18. Who did you get to join with you?

A. I got three other people, Mr. Philip G. Cole, former president of the company I was associated with; Frederick Trisiner, who was a treasurer and vice-president of the company, and Edward L. Blackman, attorney.

Q. 19. Have any of those persons ever dealt in pepper before?

A. Not to my knowledge.

* * * * * * *

[fol. 33] Q. 34. It was in no sense a regular commercial undertaking?

A. No.

Q. 35. How much pepper did this company own and have in storage in the United States at the time when the war broke out?

A. About 17 or 18 million pounds. I should say nearer 17 million pounds.

Q. 36. Did the company ever make regular daily or monthly or weekly sales of pepper?

A. No, we did not.

Q. 37. Did it ever have any customers?

A. It did not.

[fol. 34] (p. 89)

X Q. 93. Will you restate, Mr. Hunter, the main purpose that you people had in mind for this corporation?

A. To acquire a position in pepper, mainly black pepper. I say that because we did own some white pepper, but our position was to be maintained in black pepper.

(p. 90)

A. (Continuing:) We would hold it until a time when we could balance up the declining dollar with the advancing commodity price of this pepper.

When the time seemed opportune, and we were getting good advice from people we thought were dependable, we would then sell that commodity and put that into dollars or put the dollars into something else, but it was to maintain a position, a level, with the number of dollars.

We did the same thing in real estate and the same thing with bonds. Those investments turned out very profitably.

(p. 92)

X Q. 103. How did pepper turn out?

A. If our hands had been free, it would have turned out just as well as the real estate and bonds.

X Q. 104. How did it turn out?

A. Well, we don't know yet. I think it will depend somewhat on the outcome of this hearing. We don't know. [fols. 35-37] That is only part of the result of our operation.

X Q. 105. You began accumulating this pepper in 1933, is that right?

A. Yes, in 1933.

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[fol. 38] (p. 113)

Direct examination of Mr. Katz Continued.

By Mr. Blackman:

(p. 115)

Q. 215 Mr. Katz, if we assumed that there had been no price fixed for pepper in December, no ceiling price fixed for pepper in December 1941, but that pepper had been treated exactly as the other spices had been treated, and a ceiling price had been fixed in March or April, 1942, at the market price existing at that time, what in your opinion would have been that level?

Q. 216 The purpose of my question, Mr. Katz, is to find from you what in your opinion would have been the market price of Whole Black Pepper Lampong in New York City

(p. 116)

in March, April or May 1942, if there had bee no ceiling price fixed prior to that time?

The Witness: According to my idea you would have received somewheres between 30 and 40 cents a pound.

[fol. 39] (p. 117)

By Mr. Blackman:

Q. 219 Have you any comparisons in mind upon which you base that?

A. I am basing this on the general trend of the spice business during January, February and March, where in several articles there were considerable stocks available. There were still large supplies arriving, like in cinnamon and similar articles, and notwithstanding that, those articles moved to a very large extent to the levels on which they were finally frozen by the O.P.A. on the March 1942 prices.

I am also basing it on my experience in the other countries where also pepper and other spices were coming in during that same period and where the prices did rise to levels of that kind.

Q. 220 Mr. Katz, if we assume that there had been no ceiling price established for pepper and that trading in it was without that restriction, what in your opinion would have been the market price of Whole Lampong Black Pepper in New York in May 1944?

A. May I ask a question about this question? You first asked me, in the first question, you asked me, that a ceiling price should be established, April and March 1942, in the same way as the other spices?

Q. 221 Yes.

[fol. 40] (p. 118)

A. Now you asked me, if there is no ceiling in 1944. Do you refer that there should have been a ceiling in 1942?

Q. 222 No.

A. Or do you say that there would have been no ceiling at all?

Q. 223 No ceiling at all.

A. From the beginning to the end?

Q. 224 Yes.

The Commissioner: That does not mean no ceiling at all on anything. It means no ceiling on pepper.

A. If there would have been no ceiling at all during all those years, I believe pepper would have gone up in 1944 to a similar level as we had now at the decontrol of the pepper, which has been between 50 and 80 cents per pound.

Q. 225 May I repeat the question that I put some time ago. That is, in your opinion, what sum would in all probability result from fair negotiations between an owner who was willing to sell and a purchaser who desires to buy, with respect to 773,000 pounds of Whole Black Lampong Pepper in New York City in May 1944?

(Q. 225 continued) Under actual conditions, with the sin-

[fol. 41] (p. 119)

gle exception that the ceiling price with respect to pepper was non-existent?

The Commissioner: And had been non-existent all along.

(Q. 225 continued) I will put it both ways: first, had been non-existent all along. That is practically the same question as before, but I will put it that way: non-existent all along. Will you answer?

A. It requires the same as the answer on the last question. If there had been no ceiling prices at all, the value of that pepper would have been somewhere between 50 and 80 cents, and the establishment of the sales price of this local pepper would therefore be somewheres in that level, subject to what you may call collective bargaining.

Q. 226 Let us assume, Mr. Katz, that there had been a ceiling price but that it had been removed in January 1944. What effect would that have, if any, upon the figure that you have just stated?

The Commissioner: Just a minute, before you answer that question. Why should that be pertinent at all?

(p. 120)

All of this is speculative, is it not?

The Commissioner: I will exclude an answer to that question. I consider it highly speculative.

Mr. Blackman: I respectfully except.

Q. 227 Mr. Katz, what, in your opinion, would the Commodities Trading Corporation have had to pay at any

[fol. 42] (p. 121)

time subsequent to May 26, 1944, to replace the pepper that had been taken from it on that date by the Government, amounting to 773,000 pounds of Lampong black pepper?

A. The first time that replacement could be had by the Commodities Trading Corporation was in August 1946, when control was removed. At that time you could have bought Lampong pepper in Singapore for shipment to the United States at around 40 cents per pound to New York; probably a little higher. That is the bottom.

You could have bought black pepper in British India at the same period at around 36 cents per pound c.i.f. New York. The only exception there is that British India pepper has not been shipped yet on account of import and export licenses, whereas the business from Singapore has been free. Everybody could get licenses, and therefore pepper from Singapore has been shipped already and is on the

[fol. 43] (P. 122)

way; whereas pepper from British India has not been shipped yet, but we hope it will be shipped in the next few weeks.

* * * * * * *

The Commissioner: May I ask a question at this point. Is that the reason why you say it would have been impossible for this plaintiff to have replaced the pepper until

[fol. 44] (p. 123)

August of 1946?

The Witness: Yes. If I may explain that to you, nobody was permitted, on account of the O.P.A. regulations, to buy and bring in any pepper at the prices prevailing in the Orient.

The Commissioner: Suppose restrictions had been sufficiently removed or in some way not applicable that this pepper could have been physically obtained in India at the time of this requisition in May or June, what was the price of pepper in the India market at that time under this exception you were speaking about where you could deal in it?

The Witness: The price at that time in India was, I testified also this morning, about 20 cents per pound c.i.f. New York.

Mr. Blackman: I wish to make an offer to prove that the sum that would in all probability result in fair negotiations between an owner who is willing to sell and a purchaser who desires to buy, with respect to 773,000 pounds of Lampong black pepper in New York on the 26th day of May, or at any time thereabouts in 1944, would have been upwards of 30 cents per pound, assuming that there were no re-

[fol. 45] (p. 124)

strictions of ceiling prices, and the purchaser had been free to buy and the seller had been free to accept such price as they both agreed was fair.

Mr. Rood: Is that assuming the existence of all other restrictions?

Mr. Blackman: I will put it both ways.

I offer to prove that it would be in excess of that price assuming no restrictions of any kind.

Mr. Rood: Including no war?

Mr. Blackman: No, not including no war. We had a war.

Mr. Rood: And we had the customary war restrictions.

Mr. Blackman: But they were artificial. They were put on by the same agency that took our pepper away from us, and I do not think it lies in the mouth of the Government to say, "We are going to take your pepper but we won't let you take a value because we have destroyed the value."

(p. 125)

The Commissioner: Counsel has submitted an offer of proof in connection with one of the questions as to which the answer was excluded. The offer is overruled. Counsel may note an exception.

Mr. Blackman: I respectfully except.

I make that same offer in the same form with the single exception that in this case I assume that all Government
[fol. 46] (p. 125)
restrictions were on except ceiling prices for pepper.

Mr. Rood: Isn't that what the last one was?

The Commissioner: I do not know.

Mr. Rood: I do not see the difference between this one and the last one.

Mr. Blackman: The last one assumed there were no restrictions, no Government restrictions, and in this case
(p. 126)
I am assuming that there was no ceiling price but other Government restrictions were in effect.

Mr. Rood: I do not suppose that is capable of proof.

The Commissioner: Are you making that offer in connection with the exclusion of testimony?

Mr. Blackman: Yes, sir.

The Commissioner: Very well. The offer is overruled.

Mr. Blackman: I respectfully except.

[fol. 47] (p. 127)

X. Q. 234. At the conclusion of your testimony yesterday, Mr. Katz, you were talking about your hypothetical views as to what willing sellers and buyers would have agreed upon as a price for a sale of pepper at the time of the requisition under various conditions. I do not remember all the figures you gave and I am going to ask you to repeat two or three of them. First of all, under actual conditions as they were, assuming the war and assuming all the consequences of the war, what would the price have been?

Mr. Blackman: You mean including the ceiling price?

Mr. Rood: Yes.

A. There was no price.

X. Q. 235. There was no price?

A. We could not buy and we could not sell. You could sell if you wanted to, but there were no sellers.
(p. 128)
Under actual conditions there were no sellers, so I cannot name a price.

X. Q. 236. What price would a willing seller and a willing buyer agree upon?

A. We could not agree.

X. Q. 237. You could not agree?

A. No.

X. Q. 238. Why not?

A. Because O.P.A. prevented a seller to be a willing seller.

[fol. 48] X. Q. 239. O.P.A. prevented a seller to be a willing seller? How?

A. Because the O.P.A. put out an unfair price to the holders of pepper, which the holders of pepper did not want to sell at, and the trade has been trying all that time to change the mind of the O.P.A. and bring about a market, but the O.P.A. would not listen to the advice of the trade.

[fol. 49] (p. 129)

X. Q. 243. Did the first ceiling cut the price?

A. No, that was the price which was prevailing in the market on December 7th, 1941.

X. Q. 244. Then a willing seller and a willing buyer would have been able to agree then, would they not?

A. On December 7th, yes, and after that also business was done. If I may explain to you, if you permit me——

X. Q. 245. Go ahead.

A. The ceiling price which was established on December 7th was low. It was according to the market of that month. So for that reason in the beginning there were sellers, but the O.P.A. forgot that a man has to pay storage and has to pay interest if he keeps merchandise for a long time in stock. So, in other words, if a man was willing on December 7, 1941, to sell at a certain price, he cannot afford to store such merchandise for a couple of years just for the pleasure of other people, and then sell them still at the same price.

[fol. 50] (p. 138)

X. Q. 285. Then the removal of O.P.A. price control does not necessarily produce a price increase, does it?

A. If I may reply to that question—maybe I have to be a little long—but I would like to give you there the exact facts.

X. Q. 286. First of all, answer the question and then you may explain. The question is, it does not necessarily produce a price increase?

A. No.

X. Q. 287. All right, now explain.

A. There are articles which are in good supply. There are articles which are in fair supply. I mean, they have been during this whole period of five years. And there are articles which are in very small supply.

I have been myself a member of several advisory committees of the O.P.A., appointed by the O.P.A. as such, and we have treated all those different articles according

(p. 139)

to that formula which I mentioned there. We have advised the O.P.A. accordingly.

If you would look through the minutes of the O.P.A.'s advisory committee on spices for the last five years, you could have seen that I myself and every member of the committee had told the O.P.A. that buying, holding down the price of pepper at what we call an unfair and impossible level, they were creating a scarcity which would bring [fols. 51-52] about a tremendous reaction later on.

In other words, we told the O.P.A. that we could as a trade keep pepper on what we thought would be a fair level, which we considered somewhere between 20 and 30 cents, if they would leave us free.

And we predicted to them that if they kept their ceiling at the price at which they were keeping it, that we would see a rebound much and much higher. It has been proven by the fact that at the moment of decontrol, the market today is 80 cents. If the O.P.A. had not kept that ceiling of 61½ cents, which was wrong, which was wrong according to everybody in the trade, we would not be selling pepper today at 80 cents.

. . . . . .

[fol. 53] X. Q. 298. Will you describe the exact nature of the differences in conditions which made 4.1 a fair price in 1940 but made the price which you said yesterday a fair price for May 1944. First of all, what did you say was a fair price for May 1944?

A. Between 30 and 40 cents I said yesterday.

X Q. 299. Now tell us.

A. I me , there were two questions asked: one was between 30 and 40, and the other was between 60 and 80. I don't know, if there had been no ceiling or if there had been a ceiling?

X Q. 300. If there had not been a ceiling.

A. If there had never been a ceiling, I said 50 to 80. If the ceiling had been postponed three months I said 30 to 40. [fol. 54] X Q. 301. What was the factor which made the difference between those two estimates?

A. The factor was if there had never been a ceiling the market would have its natural flow for the four-year period; in other words, prices would have gone up according to the needs of the people, and slowly prices would have moved

(p. 143)

to that basis which brings the supply in relation to the price. Whereas if only three months would have elapsed to have that free flow of merchandise, naturally, of course, then the price would have been lower. So that is why I made two hypothetical guesses, as far as that is concerned.

The Commissioner: I do not understand that. Can you put your finger on the factor to which you would ascribe a higher price wholly uncontrolled, than a higher price if there had been controls, but delayed.

The Witness: Yes, sir. When the war broke out in December 1941, we had here in New York in this country, a stock of about 100 million pounds of pepper, which was enough for three years' supply of our consumption in this country alone, because in addition to that we had to supply also South America and some other countries.

Therefore, if you had no control on prices for three months, I as a merchant have to take into consideration that there is a supply here of 100 million pounds; that that [fol. 55] supply has to be marketed. In other words, I would not go in the market and bid a dollar a pound for pepper if I know that there are 100 million pounds laying here in the warehouses.

So the trade will go slow and pay a fair price, which as I said yesterday, was between 30 and 40 cents, to my esti-

(p. 144)

mate, but they will not go to extremes.

Now the next point is, we go to 1944, which is two and a half years later. I figure that in that two and a half years there will have been a consumption of 70 million pounds at least. I have the figures there which have been consumed in the reduction of stock. So, consequently, in 1944 there is only a stock left of let us say 30 million pounds. Consequently, the law of supply and demand goes up with available supplies, which then has an upward move and brings that pepper up then to 80 cents.

The Commissioner: Why would there have been no additions to the supply from such sources as British India during that period?

The Witness: The supplies from British India, which were possible during the war-time, would have been at the utmost 20 million pounds. It is a nice quantity and we wanted that. That is why we were arguing with the Government to put the ceiling up and make it possible for us to bring it in, but the surplus in British India above their domestic consumption was for those years only 20 million pounds.

[fol. 56]

(p. 144)

Mr. Blackman: For how many years was that?

The Witness: Over the three years of the war.

The Commissioner: All right, Mr. Katz.

The Witness: If I may still add a little explanation,

(p. 145)

which may be interesting for you, as long as you like to get the market. The same applies to Brazil, as I told you yesterday, where the ceiling was first established as 36 cents per pound. At that price pepper sold out entirely. There is no more pepper available. Then the Brazilian Government, at the end of 1944, abolished that ceiling. The consequence was that the price of pepper in Brazil went up to as high as two dollars per pound in the year 1945 and early 1946.

Then when in 1946 more supplies came over on account of the end of the war, Brazil received about 500 or 1000 tons of pepper, and today the price in Brazil is down again from its two-dollar high which it has had to 50 cents per pound. That explains the flow of supplies or no supplies.

(p. 146)

X Q. 305. Then you would not consider the O.P.A. ceiling price was unfair in 1944 just because of the storage costs since 1940 or since the——

A. Oh, yes. I mentioned that before, I think I have testified this morning that even if you would think that 6½ cents [fol. 57] would be a fair price in December 1941, which is still debatable, then it certainly is entirely unfair three

(p. 147)

years later when the people have to keep their merchandise in a warehouse for all those years.

* * * * * * *

(p. 148)

[fols. 57½-58] X Q. 309. Then what you are saying is that the price should have been increased to between 20 and 30 cents?

A. That is right.

XQ. 310. In order to induce American speculators to sell and also to induce foreign speculators to sell, isn't that right?

A. Mr. Attorney, I ought to say, you liked the word "speculators" when you asked yesterday——

* * * * * * *

(p. 152)

[fol. 59] The Commissioner: I am still confused about your differentiation between the price of 20 and 30 cents, and the price of 50 to 80 cents. Do I correctly recall your testimony yesterday to be that the price of pepper in British India, such as was available, at the time of this requisition in May 1946, was about 20 cents a pound?

The Witness: Correct.

[fol. 60] (p. 153)

The Commissioner: I do not understand why that price would have been so low if the other conditions existed to which you testified as to a short supply constantly growing shorter. British India was the only source, was it not, of pepper to the entire allied world?

The Witness: Correct.

The Commissioner: As far as I can tell from your testimony it comes down to this; that if that source of supply had been used during the time it would have been used up and the price of pepper in India would have gone up along with the price here, but since that supply was not picked up during those times, it did not rise; is that correct?

The Witness: That is correct.

The Commissioner: Why was that supply in India not accumulated by goverenmental action of the Allied Combined Food Board?

The Witness: I can understand perfectly your ideas. In fact, it shows that you see the same picture which we saw in the trade in 1943 and 1944.

The question is this: We wanted that pepper and needed that pepper here. The Combined Food Board is taking care of the allocation of all kinds of foods all over the world. Consequently, the United States Government and the British Government and the Canadian Government, who

[fol. 61] (p. 154)

constituted at that time the Combined Food Board, ruled that out of that surplus of pepper which there was in

British India, the United States would receive 5000 tons of pepper. In other words, that pepper, that ten million pounds of pepper was at our disposal.

On account of the Government workings nobody in British India, therefore, could ship that pepper anywhere else. I would have liked to buy it for Brazil or Argentina or Chile or anywheres, and I could have made a nice profit on it. We could not. That pepper remained reserved for the United States, but the O.P.A. did not permit us to buy it. So there it remained in British India, and this poor rich man in India that we spoke about, had to keep that pepper there in the warehouses and everywhere, and was not allowed to sell it to any other country, because the Food Board had said, "that's for the United States," but the United States did not buy it because it did not want to pay the prices. And we had been quarreling about that in our different meetings in Washington for the last two years.

The Commissioner: The price in India was not controlled, I think you said, as such.

The Witness: To some extent, yes. It was a free market to some extent, but on account of the fact that they were not allowed to sell it anywhere else——

[fol. 62] (p. 155)

The Commissioner. That is what I am getting at. There was no price set, but the direction in which the sales could be made was controlled.

The Witness: That is right.

The Commissioner: And is that the reason why the pressure did not build up or why the owners of this Whole Pepper did not realize the shortage in supply and the potential increases they could demand?

The Witness: Oh, they did realize it. They were posted about it, but still, what can you do when you buy and you cannot sell. Suppose you want to sell me this chair, but you say, "Mr. Katz, you are now allowed to sit on it." Then the value of that chair is lower than if I am allowed to sit on it. That was the same as this pepper. They said, "Boys, you may sell this pepper, but you are only allowed to sell it to the United States."

Now, consequently, the people—and to prove to you the correctness of that—at the moment, in August, in our prices here, when our prices were decontrolled, then immediately the British India people said, "Now we know we can sell it to the United States, but we can sell it at our prices, so

we are paying them between 35 and 40 cents for it, which we could have bought last year at 22 cents, and we were prevented from doing that again by the O.P.A. Now we can do it and now we pay 35 and 40 cents for it.

[fol. 63] (p. 157)

X Q. 336. There was a war going on in 1940, was there not?

A. Not in the Orient; in Europe.

X Q. 338. There was no war in the Orient?

A. In 1940, no. It started December 1941. The war against Japan started December 7, 1941.

* * * * * * *

(p. 158)

X Q. 341. There was war on the high seas, was there not?

A. Not on the Pacific; on the Atlantic, yes. And not the American fleet, but only of the British and the Germans and the French.

X Q. 346. And if the United States had not gone to war with Japan, then the price of pepper would have remained low, is that correct?

A. Not as low as it was. If you want again a prediction from me, like you have been asking me so many things, but just as I explained to you, the guesses which I made, I will explain this too: that we know that after seven lean

[fol. 64] (p. 159)

years you have seven fat years, and that is the cycle, except that people explain it in a different way. I always say that when an article is cheap it is going to go up again, and then when it is high, it always goes down again.

(p. 160)

X Q. 352. Maybe you misunderstood my question. What I mean is that you would say that you would not testify on oath that 6½ cents would have been an unfair price if there had been no war and no O.P.A., would you?

A. Yes, sir. I would have said that 6½ cents would still be an abnormal low price for pepper. The average, as I said yesterday, the average of fifty years of pepper was 13½ cents. So when an article sells at 6½ cents—that's the way we business people figure—when an article sells at 6½ cents and when the average price of fifty years is 13½ cents, we say, "Boys, this is still a bargain."

X Q. 353. Yes, but I mean you would see no factors which would have increased the price from the 1940 level more

(p. 161)

than 6½ cents within that period, would you?

A. Oh, yes.

X Q. 354. What would that have been?

A. I testified yesterday, I think, that low prices cause smaller plantation and smaller production, whereas high prices causes larger plantation and larger production, but now we were in a period of low prices; consequently, the production was already curtailed and would have been further curtailed.

[fol. 65] (p. 164)

X Q. 369. You cannot testify on oath that in your opinion had there been no war between the United States and Japan and no price control, that under those conditions a price fifty per cent higher than the 1940 price would not have been fair value, can you?

(p. 165)

Mr. Rood: I will state that I mean a fair market price in New York.

A. You mean in May, 1944?

You want to know if there had been no war, if I would then consider that in May 1944, 6½ cents would still have been a fair market value in May 1944?

(p. 166)

If I may give you a little background on the market before, then I will explain to you again, just like I did on those other questions, on what I base my opinion. I think the price should have been higher at that time. Will you permit me to go back and explain to you the market conditions before 1939 and after, and I can explain to you why it is.

I will tell you. We had a big over-production in the years 1935 to 1938, and I think Mr. Blackman has been referring yesterday to my reports. Some of them they did not like at that time, in the early time, because I was just giving them—their idea was good but they were timing it wrong. When they started already to buy pepper in 1933, 1934 and 1935, we were still getting an overproduction, and that overproduction time did come up in 1935, 1936 and 1937.

[fol. 66] (p. 166)

And having in mind that this is not a crystal ball gazing for me, but I had the information from my own people in

Sumatra, where I have my office, and they said there was a big production coming, and that big production came during those years; the big production was stopping in 1938-1939.

[(fol. 67] (p. 167)

X Q. 374. How do you know that?

A. For the same reason that I knew it was coming, because my people saw the planting and my people saw the neglect of the plantation- which were there. If you read through—I am not just saying this now—but if you would ever read through my market reports for the year 1935 through the year 1941 and 1942, you will see that what I am saying now was expressed in those reports.

X Q. 375. That is, you are saying that pepper production was leveling off after 1938?

A. Yes sir. On account of the low prices, just as I explained yesterday, on account of those tremendous high prices of the years 1925, 1926 and 1927. And they made the mistake—that is what I have been telling them—to forget that we had such an abnormal high price in 1926-1927 of 40 cents per pound, which was abnormal at that time for the pepper market. It was the highest price we have reached in fifty or one hundred years, or whatever it was, and on account of that production increased so tremendously.

On the other hand, when we reached, I think 1937 or 1938, the price of three cents, that price again was so abnormally low, which we also knew that abnormal low price was going to cause again a reduction of the production, just as the abnormal high price in 1926-1927 caused this abnormal

(p. 168)

over-production, so as soon as we reached the price of three cents, which was the lowest price—I think I sold pepper as [fol. 68] low as three cents out there—and as soon as we reached that price, no grower any more could buy fertilizer or anything to sustain his production, and from that time on production started to decrease again.

Therefore, if you ask me now the question: Mr. Katz, if there had been no interference of O.P.A. between the years 1941 to 1944—

X. Q. 376. And no war.

A. And no war during that period, what would have been the market, I base myself on that same cycle which you have been saying; larger production, lower price. We are now

in the period of smaller production and consequently higher price. The average price of the last fifty years has been before 1941, 13½ cents, so we were heading again for the higher price levels.

X Q. 377. When was this low of 3 cents reached?

A. It is in the booklet you have. The low price was reached in June, 1939.

X Q. 378. June 1939 was the rock bottom of the cycle then, is that right?

A. Yes, sir. And from that moment on it kept steadily going up, and just as you said, the war in the Atlantic did

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not make so much difference because it just went steadily up. You see, 3.5, 4, 4.1, 4.8—it did not go up more than 4.1 when there was the Atlantic war—and then in 1941 it [fol. 69] started to go up further.

X Q. 379. You do not know how far it would have gone by May 1944?

A. No, sir, that is too much of a guess.

X Q. 380. Of course. But how long does this pepper cycle usually take?

A. That I cannot tell you either exactly, because many people thought that it would take seven years. Even Professor Pearson, who wrote the booklet, thinks from the past he has proven that it takes seven years on account of the planting and everything, but I told him that seven years could fool him very much because if you had an abnormal small production and abnormal high prices, like we have had the cycle would be extended until that abnormal condition was leveled off.

X Q. 381. You said that in 1941 at Pearl Harbor day, there was a three-year supply in the United States?

A. Three-year supply for only the American United States consumption, yes, but I said also that we were also supplying other countries.

X Q. 382. Yes.

A. And as I testified yesterday, the total would consump-

(p. 170)

tion was about 120 million pounds.

[fol. 70] X Q. 383. All I want to know is, was that an abnormally high supply?

A. Yes.

X Q. 384. Twice as much as usual?

A. Much more. Going back to three years before that, there were practically no reserve stocks available at all. Also there in the booklet, that is taken from one of my annual reviews, you see the world surpluses of pepper for all the years.

There is in this booklet also of Professor Pearson, that was taken also from some of my reports, that in the year 1932 the world shipments were estimated at 52,650 tons, and the consumption for the world at that time was 55,000 to 60,000 tons, which means that the consumption was greater than the total shipments by 2000 to 7000 tons. Therefore, surplus stocks were rapidly liquidated and by the end of 1932 world surpluses were estimated to be only 4299 tons in all consuming markets, and then we started to work upwards.

Mr. Blackman: Then the big production from enormous planting in 1927, 1928, 1929 and 1930 began to come on the markets

The Witness: That's right. Then our stock was accumulated to those 100 million pounds which we had when

(p. 171)

the war broke out.

[fol. 71] (p. 177)

X Q. 417. I suppose that if the stocks in this country had been available for export, they could have been exported and sold abroad, could they not?

A. Yes, sir.

X Q. 418. By coming into the markets abroad, that would have reduced the foreign prices, would it not?

A. No, because we did not have enough stocks here to supply the needs of the consumption in all the other countries, because, in other words, we would still have been short. If we had exported every bit which we had in the years 1944 or 1945, whatever you want to say, you would

(p. 178)

have been able to obtain any kind of price for that merchandise in the other countries of the world, because that quantity which was available was still an infinite small percentage of the needs of those countries at that time.

X Q. 419. of the entire world?

A. Of all the available countries which were able to buy during that period.

X Q. 420. I mean, you said that there would have been a small addition to the needs. It would have been a small addition to supply the needs of the entire world?

A. That is right.

X Q. 421. What are the countries which are normally supplied from this country?

A. South America, Central America, West Indies.

[fol. 72] X Q. 422. The New World?

Mr. Blackman: And Canada?

A. Yes, the Western Hemisphere.

Mr. Rood: He did not say Canada.

Mr. Blackman: I asked him.

The Witness: Also Canada.

X Q. 423. Do we supply Canada?

A. Yes.

[fols. 73-74] (p. 179)

Redirect examination.

By Mr. Blackman:

R. D. Q. 429. Mr. Katz, in one or two instances in answer to Mr. Rood and in answer to me, too, yesterday, you said or you used the words "that is a guess." By that did you mean that was your opinion and that you could not know the facts?

A. That is right.

R. D. Q. 430. Based upon your long familiarity with this kind of business, that was your best opinion?

(p. 180)

A. That is right.

R. D. Q. 431. I think you also said you would not guarantee it.

A. That is right. I would rather make statements that I know about than to give just opinions.

* * * * * * *

[fols. 75-78] R. D. Q. 439. Do you mean by that that the markets of the world, and supplies of the individual producers had been swept clean by these terrific high prices; everybody who had a pound wanted to sell it?

A. In 1927 and 1928?

R. D. Q. 440. Yes.

A. Yes, sir.

R. D. Q. 441. And in addition to that, this low price was a result of the fact that the wise people saw this enormous production coming in two or three years?

(p. 182)

A. That is right.

R. D. Q. 442. And that is a common thing, the market foresees these things and registers prices two or three years in advance of what actually happens?

A. They try to do it. They do not always succeed.

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[fol. 79] (p. 186)

R. D. Q. 451. In considering the quantity of pepper that was on hand in the United States in the early part of the war, is it necessary to consider the fact that this Government had undertaken to supply pepper to Canada and [fol. 80] South America?

(p. 187)

A. Of course.

R. D. Q. 452. And it did supply large quantities of that pepper to Canada and South America, did it not?

A. After the outbreak of the war, in large quantities. That is just it. There has been a big fight in our meetings every year between the export trade and import trade. The import trade wanted to keep everything here and the export trade wanted to supply the foreign customers also. It was just a question of how much.

R. D. Q. 453. And export licenses were granted from time to time to dealers in pepper to export it to South America?

A. Yes, sir.

R. D. Q. 454. You got some of those yourself, did you not?

A. Yes, sir.

R. D. Q. 455. You know that we got some?

A. Yes. I did not know you were as much competition as that.

R. D. Q. 456. And those export licenses fixed the ceiling price for the American exporter to sell in the South American countries, but that price was higher, substantially higher than the ceiling price in the United States?

A. That is correct.

R. D. Q. 457. Which made everybody try to get as many licenses to export as they possibly could?

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A. Correct.

(p. 189)

[fol. 81] R. D. Q. 462. Mr. Katz, what was the reason for the situation which you disclosed in your testimony where pepper was selling in India for only 22 or 23 cents, and was selling in Brazil for as much as $2.00 a pound?

A. For the simple reason that you could not bring the one to the other. If you would be able to do it, it requires, just as simply as to say that my own pepper, which I had here in the warehouse and I could not sell here above 6½ cents, if I only could have taken it on my back to Brazil I could have sold it, but I wasn't allowed to do it. The Indian man was not allowed to do it either.

R. D. Q. 463. That is, the British Government and the American Government by agreement restricted the exportation of India pepper?

A. Correct.

R. D. Q. 464. And they were allowed to export only to England and to the United States practically?

A. No. They got some allocations to all different countries but only for very small quantities.

[fol. 82] (p. 200)

R. D. Q. 497. And in that connection, Mr. Katz, have you tried from time to time to induce the Army to reduce the amount of controversy between itself and the persons from whom it requisitioned pepper by returning pepper to the people that they took it from?

A. Yes, sir; I have been, as I said, for the last five years, I have been working on this pepper controversy, and I have given several good solutions. I have been writing it in my reports, my market reports, "The Pepper Follies of 1943, 1944 and 1945." And I have been up at the War Department, I have been in the Agriculture Department, I have

(p. 201)

been trying to avoid all this loss of time which we are having here in the last few days.

R. D. Q. 498. As a matter of fact, it turned out, Mr. Katz, that the Army requisitioned a great deal more pepper than they really needed?

A. That is correct.

By Mr. Rood:

R. X Q. 499. How do you know?

A. Because after the war was over, pepper was returned. It was sold as surplus by the United States Government.

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[fol. 83] (p. 201)

Redirect examination.

By Mr. Blackman:

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(p. 202)

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R. D. Q. 502. And they refused to do that?

A. Yes, sir.

By Mr. Rood:

R. X Q. 503. When was that?

A. During the course of the last year, since the end of the war.

[fol. 84] William Archibald, Jr., a witness produced on behalf of the plaintiffs, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct examination.

(p. 203)

By Mr. Blackman:

Q. 1. Mr. Archibald, what is your business?

A. I am a spice broker and an import agent.

Q. 2. For how long have you been engaged in the spice business, in one way or another?

A. Since 1910.

Q. 3. Please state the various ways in which you have been engaged in that business over that period.

A. From 1910 to 1926 I was in the employ of Archibald & Lewis Company, who were grinders and importers of spices. From 1926 to 1928 I was the president of a cor-

poration known as I.H.E.C. of New York, Inc. We were in the business of importing spices.

From 1928 to 1929 I was vice-president of Charles E. Armstrong, Inc., who were importers and exporters of spices.

From 1929 to 1931 I was vice-president of John Clark & Company, spice brokers.

From 1931 to 1937 I was William Archibald, Jr., Inc., spice brokers and import agents, as I owned the corporation.

From 1937 to the present time I have been a partner
[fol. 85] (p. 204)
of the firm of Van Norden & Archibald. I have two other partners and we are in the business of acting as brokers and importers in spices, varnish gums, rubber and miscellaneous foreign produce.

Q. 7. But in what parts of the world or the country do you do business?

A. We do business with importers and manufacturers in the United States and Canada, and we also do business as selling representatives of firms in all countries of production and all trading centers in our line of goods, such as places in Holland, Dutch East Indies, Straits Settlement, China, Africa, India, Zanzibar, Madagascar, West Indies, Mexico, etc.

Q. 8. Has black pepper been one of the classes of spices that you have dealt in?

A. Yes.

Q. 9. Was it one of the most important or the most important class of spice that you dealt in over this period?

A. Yes, one of the most important.

[fol. 86] (p. 205)

Q. 10. Was it the most important?

A. Well, pepper is the most important article in the spice trade, and except during the war years, when we had a restricted market, it had always been one of the most important articles in our particular business.

Q. 11. That is, it was responsible for a large part of your entire volume?

A. Volume and time and attention, yes.

Q. 12. Mr. Archibald, have you had occasion to be a member of any associations of spice dealers and have you taken an active part in the spice industry outside of your regular business?

A. Yes, I have always been a member of the Spice Trade Association through the firms I have been connected with.

Q. 13. By the Spice Trade Association to what do you refer?

A. We have only one, the American Spice Trade Association.

Q. 14. And that represents the entire industry?

A. Yes, that represents the entire industry.

Q. 15. Throughout the United States?

A. Yes. It is rather a unique organization in that unlike most trade organizations we represent all parts of the industry. Our association has among its members brokers, manufacturers, impport agents, importers.

[fol. 87] (p. 206)

Mr. Rood: What do you mean by "we represent"?

The Witness: Well, I mean that all classes of trade belong to the association, so that the work of the association represents the thoughts and problems and interests of all these phases of the industry. Frequently you will find a trade association is an association of brokers, or it is an association of importers, or it is an association of manufacturers. Our association is an association of all.

A. I was secretary of the association in 1917 until I went into the last war, and in 1942 I was elected treasurer and a director. In 1943 I was elected vice-president. In 1944 I was elected president and served until 1946. I am now a director of the association and chairman of the arbitration committee of the association.

[fol. 88] (p. 207)

Q. 19. Mr. Archibald, in the course of your business is it necessary for you to be familiar with the market prices of the spices that you deal in in various countries of the world?

A. Yes.

Q. 20. And have you kept yourself so familiar for a number of years?

A. I have certainly tried my best.

Q. 21. Is it also necessary for you to know and understand the factors that influence those prices?

A. Yes.

Q. 22. And have you kept yourself informed concerning those factors?

A. I believe I have.

Q. 23. Such as supply and demand and freight rates and things of that kind?

A. Yes.

Q. 24. Everything that would enter into the price of the merchandise that you sell?

A. That is right.

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[fol. 89] (p. 208)

Q. 29. As a broker, is it important for you to know

(p. 209)

[fol. 90] where and how to purchase the spices that you deal in?

A. It certainly is.

Q. 30. Does that apply to black pepper?

A. It does.

Q. 31. Was any black pepper being offered in the City of New York or anywhere in the United States at or under the ceiling price of 6½¢ in any month of the year 1944, prior to October?

Q. 32. Was there any such pepper offered at any such price?

A. No.

Q. 33. I said the ceiling price of 6½ cents now. That was the basic ceiling price, was it not?

A. Yes.

Q. 34. And there were small multiples in addition to that 6½ cents for quantities smaller than the 100 bags as I believe, is that right?

[fol. 91] (p. 210)

A. That is right.

Q. 35. And also there was an allowance in addition to the 6½ cents for putting the pepper in the warehouse, as they call it, is that correct?

A. That is right.

Q. 36. When you say there was no pepper offered at or under the ceiling price, it takes into account those allowances?

A. That is right.

Q. 37. Were you familiar in 1940, 1941, 1942, 1943, 1944 and 1945, with the world conditions of pepper?

A. I think so, yes.

Q. 38. What the stocks were, where they were, what was being bid for them in different places?

A. Well, during the war years, information which we ordinarily would have about stock situations and business operations in countries that were pretty much beclouded in their information on account of the war, such information was not freely available, so that with reservations I would say generally so, as much as a person could be under war conditions.

Q. 39. Well, you knew what the conditions were in this country?

A. Yes.

Q. 40. How much pepper there was and what the demand

[fol. 92] (p. 211)

for it was?

A. That is right.

Q. 41. Did you know conditions in South America?

A. Generally, I mean, that was trade information from reports coming in.

Q. 42. And did you have reports upon conditions in India and England and other places?

A. Yes.

Q. 43. That is, what the markets were in those places, and what the quantities were, and items of interest of that kind?

A. That is right.

Q. 44. Mr. Archibald, have you an opinion as to what would have been the course of prices in the United States with respect to Lampong Whole Black Pepper if no ceiling had been imposed prior to March 1, 1942?

A. Yes, I have an opinion.

Q. 45. And upon what do you found that opinion?

A. Upon my experience in the spice business, with pepper and other spices.

[fol. 93] (p. 212)

Q. 46. Will you please state what, in your opinion, would have been the course of prices of pepper after the World War, beginning December 1941, had there been no ceiling price imposed prior to April 1, 1942?

A. Well in my opinion we would have had a very active market in pepper. For the first month or so probably a slow advancing market, because there was a large quantity of pepper here. Some of it had been of low cost, and it is our usual experience in such matters that such holders sell out rather quickly.

Q. 47. Especially where there is an excess profits tax?

A. That is right. The market in my opinion would have picked up rather rapidly after the first of the year, and by the spring of 1942, in my opinion, the market for pepper would be somewheres in the range of 30 to 50 cents a pound.

Q. 48. You are speaking now about Whole Black Pepper?

A. Yes, Whole Black Pepper.

Q. 49. The Lampong variety?

A. That is right.

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[fol. 94] Q. 50. Now, in your opinion, Mr. Archibald, what would have been the sum that would in all probability result from fair negotiations between an owner who was willing to sell and a purchaser who desired to buy, with respect to Whole Black Pepper in a quantity of 773,000 pounds in New York City in May, 1944, assuming all the restrictions which were in effect at that time, but excepting the ceiling price on pepper?

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A. I would think that the price range of such a transaction would have been somewheres between fifty cents and a dollar a pound. That is rather a wide spread. I do not think it would have been any less than fifty cents a pound, and I am quite sure that in a free market, if the goods had been offered at closer to a dollar a pound than fifty cents a pound, it would have found ready buyers.

Q. 51. Do you know at what prices this kind of pepper was selling in various markets of the world at that time?

A. We had, of course, access to no market of supply excepting—I mean, no information as to the prices here in markets of supply because the countries of supply were cut off, were cut off by the war, with the exception of India. As I recall, the market price in India at that time, it was

[fol. 95] (p. 214)

roughly in the neighborhood of 20 cents a pound. There again, that market was limited in any supposition of what the market might be by the fact that they had very few selling outlets, and for that reason I would not say they had really a free market.

Q. 52. That is, the price was not restricted but their ability to sell was?

A. Yes.

Q. 53. By the British Government?

A. And if their ability — sell would have been there, their price would undoubtedly have been higher. We also had a controlled market in London where, as I understand it, operations of that market, the Government food authorities bought the pepper, and no matter what they paid for it, sold it at a price which was roughly a shilling a pound, about twenty-odd cents a pound to the trade.

Then we have the other countries, principally on the Western Hemisphere, and there the reports reaching us were to the effect that the market range from some forty or fifty cents a pound to two dollars a pound, depending on the countries and the supplies at the time, and so on. But over that period the world market price for pepper was very high.

[fol. 96] (p. 215)

Q. 54. Mr. Archibald, what, in your opinion, would have been the lowest price at which this Company, Commodities Trading Corporation, could have replaced 773,000 pounds of Whole Black Pepper which was taken by the Army on the 26th day of May, 1944?

A. The first opportunity they would have had to replace it was this fall when pepper prices were released from O.P.A. control, and when import licenses were given to import pepper. And then pepper could have then been bought at Singapore in that quantity at prices ranging from 45 to 55 cents a pound, c.i.f. New York. It might cost you a little extra to put it in storage and also to actually replace it, but say at an average of 50 cents per pound. That would be the first opportunity that I know of. There would

[fol. 97] (216)

have been an opportunity to replace it in India if restrictions were removed, but there you go into the ifs, ands and buts. This fall was the first time it was possible to actually replace it.

Q. 55. No pepper has come in from Indian since the removal of the ceiling?

A. No.

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A. (Continuing) I say no, with this possible qualification——

Mr. Rood: Since the removal of our ceilings.

Mr. Blackman: The ceiling on pepper in the United States.

Mr. Rood: O.P.A. ceilings.
Mr. Blackman: O.P.A. ceilings, yes.

A. (Continuing:) The Government has told us that they are bringing in some pepper from India, which is expected to arrive momentarily. As far as I know, it has not yet arrived, and if it has arrived, that would qualify that answer, but I do not know that it has.

Q. 56. Up to the present time, however, has it been possible for individuals or brokers or importers to purchase pepper in India and import it into the United States?

A. It has not been possible to complete the transaction. There have been some tentative transactions made subject

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[fol. 98] to export licenses being granted by the Indian Government.

Q. 57. That is, you have to qualify first of all in order to get an import license from the American Government?

A. That is right.

Q. 58. And after you have gotten that, you have got to negotiate for your pepper in India, and then if you buy, then you run the risk of getting or not getting a license from the Indian Government to export it?

A. That is right.

Q. 59. Do you know of any licenses which have been granted by the Indian Government for the export of pepper of that kind to any private individual firm or corporation?

A. No.

Q. 60. They are trying to get it at the present time?

A. That is right.

The Commisioner: Does that mean that it is still impossible for this plaintiff to replace this pepper?

Mr. Blackman: Yes.

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[fol. 99]

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X Q. 83. If there had been no war, what would the price cost have been from Pearl Harbor day on?

A. Well, I was in the courtroom this morning and heard Mr. Katz's testimony in that respect, and it was very intelligent testimony. Mr. Katz is a very well informed member of the spice trade, and I am quite largely in agreement with that testimony.

My experience in pepper, which now goes back to well over thirty years, has been that pepper, like most other commodities, has its ups and downs, and we found that when a price is high, production is encouraged. If prices go very high, we get a very big production. That is followed by a period of low prices because of the big production. In turn, the low prices curtail production, and prices improve, so that it becomes profitable to produce, and you have a succession of cycles.

Now, the high prices in the Twenties caused a heavy production of pepper and heavy planting of pepper vines, and we began to get in the mid-Thirties a very large production. The price because of that large production

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slumped off to historically low prices, and that in turn curtails production.

So that in the normal following out of that cycle I would say that we would have had a reaction from the low prices so that prices would reach a point where they would [fol. 100] be higher than the minimum or average price which I have always considered from my own personal qualifications as around roughly 12 or 13 cents a pound.

I think one of the members of our trade has prepared a very secret chart which shows an average price, as I recall it, of somewheres in the neighborhood of 13½ cents a pound.

So that, answering your question, over a reasonable period of time, I would have expected the price of pepper to go to a point higher than that average price of 13½ cents a pound.

[fol. 101] (p. 227)

X Q. 91. Would there not have been a panic in the pepper market if there had not been a war in 1941?

A. Wouldn't there have been a panic?

X Q. 92. In the United States here with all these accumulated inventories?

A. I don't think so, no. What do you call a panic?

(p. 228)

The entire disappearance of values and so on?

X Q. 93. There would have been a wholesale unloading, would there not?

A. In 1941?

X Q. 94. Yes.

[fol. 102] A. Without the war?

X Q. 95. That is right. These inventories were accumulated in anticipation of war, were they not?

A. No. Are you referring to the large accumulation that the Commodities Trading had?

X Q. 96. For instance, yes.

A. That started, as I remember, back in 1933 or 1934. I am sure there was no thought of war in their minds at that time.

X Q. 97. Not at that time?

A. No.

X Q. 98. But there was in 1941. In the market there was a feeling that war was going to move into the Indies?

A. There certainly was in my mind.

X Q. 99. Yes.

A. Yes, there was.

X Q. 100. But if there had been no war, that would have had a bearish effect on the pepper market here, would it not, in view of the large inventories on hand?

A. No, I would not think so. Your market at that

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time was taking—it had had its bearish trend, so to speak, with the large production of the middle Thirties. Production was waning because of the low prices and the pepper was in good sound hands. Those people that bought it were quite able to hold it. You had a trading market on the Produce Exchange in pepper which provided a fine hedging [fol. 103] market. Trading was coming into New York from all parts of the world.

X Q. 101. What do you mean by a fair hedging market?

A. Well, I mean this: one of the largest pepper traders in the world is a company in London. They sell pepper to all parts of the world, Egypt, Italy, South America, and so on. They have to sell months ahead of time. Sometimes they take contracts to deliver a year ahead of time.

X Q. 102. Is that short selling?

A. No. And I will tell you why. Their method of business was to, for instance they have an inquiry from Egypt, we will say, for 15 tons of pepper. And this is October, for March delivery in Egypt.

X Q. 103. You do not mean that Egypt buys pepper from London?

A. Yes, right.

X Q. 104. He cables an order over to his brokers in New York. I happened to be his broker right at the minute.

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In a free market—we haven't got a trading market on the Produce Exchange at the moment—but we are taking a hypothetical position that there is a trading market there, as was the case in 1941. He cables an order over to me, we will say, as his broker, to buy 15 tons of pepper for [fol. 104] March delivery on the Produce Exchange. That establishes his cost for 15 tons of pepper for March delivery on the Produce Exchange. Well, he sold the pepper to Egypt. Now he has to get that pepper to Egypt by March. So along about January or February he has instructed his office in Singapore or in Java or in Sumatra to ship 15 tons of pepper, buy and ship 15 tons of pepper to his customer in Egypt, and they do, and they buy it at the market prices prevailing in January or February.

At the time he buys that pepper in Java, Sumatra or the East Indies, he sells his March contract in New York. He doesn't care what price he sells it at because he has already hedged his sale to Egypt by his purchase in New York. So it is simply a matter of buying it in the country of production and selling it and undoes his hedge.

To have a hedging market of that kind you have to have a lot of pepper here. You cannot do it on paper, and that was one of the reasons there was so much pepper here in store. It was being hedged by these transactions all over the world.

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X Q. 105. Can you state that if there had been no war the price of pepper in 1944, May of 1944, would have been higher than 6½ cents?

[fol. 105] (236)

X Q. 119. Had any pepper been offered in May 1944, in the New York market, what price would it have brought?

Mr. Blackman: I object to that. It is perfectly obvious that unless it was offered in conformity with the law——

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The Commissioner: Objection overruled.

Mr. Blackman: I respectfully except.

A. As I understand your question, if a seller came in the market and offered a quantity of pepper in May, 1944, what price would he have paid for it? It depends for what purpose the pepper was offered. If it were offered

for domestic consumption only, such a buyer under the law would pay 6½ cents, plus any permissible accumulations which the O.P.A. ceiling price permitted, and that would have been the highest legal price he could have paid for it. On the other hand, if a man held an export license, as some people did at that time, such a man could have paid a price plus the permissible profit that he could charge for export and have had the seller do the exporting for him. That also was done.

X Q. 120. You mean that this O.P.A. ceiling in New York did not limit sales in New York for export?

[fol. 106] (p. 237)

A. It governed sales in New York for export, but with an increased price permitted to the exporters.

X Q. 121. Does that appear in the ceiling regulations?

A. Yes.

Redirect examination.

By Mr. Blackman:

R. D. Q. 122. Suppose a seller had come into the New York market in May 1944 and had offered 773,000 pounds of pepper at the ceiling price, what would have happened to it?

A. The buyers would have stood in line to buy it.

[fol. 107] William Archibald, Jr., a witness produced on behalf of the plaintiffs, (recalled) having been resworn by the Court, was examined and testified as follows:

Direct examination.

By Mr. Blackman:

(December 16th, p. 6)

* * * * * * *

(December 16th, p. 9)

[fol. 108] Q. 32. Mr. Archibald, you were asked by Mr. Rood when you were on the stand before with respect to the course of pepper in the past and something with respect to your prediction as to what would happen or what would have happened after 1940 if there had been no war.

Now, will you please look at this graph that I show you and state whether that shows substantially the course of [fol. 109] the price of whole black pepper in New York over a period of 75 years or thereabouts?

A. Yes. I have been actively handling pepper since 1910; and the rest is a matter of history.

Q. 33. Well, many of those graphs were prepared here recently when we had these violent fluctuations in pepper.

A. That is right.

Q. 34. And that is substantially accurate?

A. That is right.

Mr. Blackman: I ask that that be marked in evidence.

Q. 35. Mr. Archibald, the past performance of pepper so far as its market movements are concerned, has been a matter of record back to 1818 or thereabouts, hasn't it?

A. That is right.

Q. 36. And is it customary for dealers in pepper and for brokers and persons carrying on the business that you are carrying on, to be familiar with that past history?

A. It is.

Q. 37. Were you actually and are you now familiar with that past history?

A. Yes.

Q. 38. Due to the very violent fluctuations that took place in the price of pepper during the last 15 years or thereabouts, were many graphs of the kind that I have shown you prepared?

[fol. 110] A. Yes.

Q. 39. And were you familiar with them at the time they were prepared?

A. Oh, yes.

Q. 40. And does this graph here actually and accurately show the prices and the variations in prices that took place over that period, according to your own information, from the examination of past records in connection with your regular business?

A. It does.

The Court: How much of this are you offering in evidence?

Mr. Blackman: Just one page, sir. "Wholesale Prices."

The Court: I think it may be admitted.

Mr. Rood: I respectfully except to the introduction.

(Marked Plaintiffs' Exhibit 1.)

Q. 49. Well now, it takes about, I think the testimony was, from five to seven years after the vine is planted before it begins to bear in volume.

A. That is right.

Q. 50. Now, we had an enormous price, according to that graph, in 1927-28 and thereabouts; is that right?

A. That is right.

[fol. 111] Q. 51. Now, what was the result?

A. Well, the result was that in the middle '30s we had a tremendous production of pepper.

Q. 52. How did that production compare with any known production previous to that?

A. It was a greater production than any previous production I know of; and, as a matter of record, I believe that it was a greater production than had taken place in the past.

Mr. Rood: When was that?

The Witness: In the mid-'30s.

Q. 53. Now, referring to that Exhibit 1, Mr. Archibald, you notice the peaks and valleys there. Now, approximately what was the duration of those low prices or valleys?

(December 16th, p. 22)

A. Between four and five years.

Q. 54. There has been no case where the graph shows above that the low prices had continued for more than four or five years?

A. No.

Q. 55. Mr. Archibald, do you know whether the same general course of peaks and valleys existed prior to the date at which that chart begins and back to 1818 or thereabouts, when we have recorded prices?

A. I don't know. No, I would have to look that up.

Q. 56. Well, now, that chart (Plaintiffs' Exhibit 1) ends in 1940, and the low price was 3 cents in 1938 or thereabouts.

[fol. 112] A. Yes. Close to it.

Q. 57. And to what point had the price risen prior to Pearl Harbor?

A. My recollection is that it was in the neighborhood of 7 cents.

* * * * * * *

The Witness: Prior to Pearl Harbor.

Q. 58. And if the course of pepper had followed, if there had been no war and if the course of pepper had followed the course it has followed during the entire period shown by that chart, it would have continued to go up from that point?

A. That is right.

The Court: How long and how far?

The Witness: Well, when you get into the matter of predicting a price as of the time of Pearl Harbor your answer to that question depends on what you assume to be the case. Now, it is one thing to make a prediction of the price in view of the circumstances as they actually existed, that is, the war coming on, the supply of the Netherlands East Indies being shut off and limited to supplies from British Indies and to stocks.

The Court: Well, that was before Pearl Harbor was it not? Didn't the breaking out of the war in Europe have its effect?

[fol. 113] The Witness: No. You see, the Dutch Indies were open and we were getting in free supplies. Some of the largest shipments came in in that period of '39-'41.

Q. 59. You started to make a statement.

A. Yes. I was just recalling that we had shipments out of Java in December 1941. The war did not reach Java, you remember, until after Pearl Harbor.

Q. 60. Now, Mr. Archibald, do you know, if there had been no war or if the United States had not been involved in a world war and if the Dutch East Indies had not been involved in a world war, if there would have been any reason why the course of pepper prices would not have followed the general course that has been followed for the last 50 to 70 years?

A. I would expect it to work; it always has, and it is the normal procedure.

Q. 61. My precise question was, do you know of any reason why it would not work?

A. No, I don't know of any reason why it would not work.

(December 16th, p. 28)

X Q. 70. When was this high peak?

A. That was 1937. You see, 1938 it was about 6⅓ in the early part of the year; it declined to about 4⅓ at the end of the year.

Mr. Blackman: And it hit the bottom in 1938 or the early part of 1939; is that irght?

The Witness: In 1938, about the middle of '38.

[fol. 114] X Q. 71. So that based on recent prices you would not say that the OPA ceiling was unfairly low, would you?

A. The OPA ceiling was all right at the time it was imposed, in 1941, for that particular period. I remember the conferences at which the OPA ceiling price was set. And I remember the Government representative saying at that time that that was the price set because that was the prevailing market price at that time. And, then, the thing that our spice trade always had in the back of its head and objected to was the recollection of the statement that as conditions changed the price would be adjustgd. And, of course, that is what we were hollering about all through the later years of the war. It got scarce; the world prices kept going higher, and we kept making repeated representations to the OPA to increase the price so that we could do business. The prices were increased only after a great lapse of time, which made it very difficult for us.

X Q. 72. But you say that you don't think the OPA ceiling was unfairly low at the time it was imposed?

A. Not in 1941, no.

X Q. 73. And that refers to the 6½ cents ceiling?

A. That is right. 6¾ cents ceiling at that time, and later on 6½.

X Q. 74. Your comment would run to the 6½ cents ceiling, too?

[fol. 115] A. That is right, at that time.

X Q. 75. What was the condition which made the difference so that you think it became unfair later?

A. Because the supplies of pepper were being distributed and the world market price rose to such a high figure that we couldn't replace our supplies, so that we were going along on a small portion of our normal requirements trying to make a stockpile piece out at low prices, where

the stockpile could have been levelled at world market prices and kept us going at a better rate of consumption.

Mr. Rood: We all agree that the stocks in the United States at the time of Pearl Harbor were around 90 million pounds.

Mr. Blackman: A little more than that. About a hundred.

The Witness: That is right.

Mr. Rood: And that the average annual consumption in the United States was about 30 million.

Mr. Blackman: About, yes. One minute. I don't want to cause any misapprehension here by that concession. That was the consumption of the Continental United States, 30 million pounds a year. It is not 30 million pounds. It is more than that. It is about 35 I think.

The Witness: Figure about 15,000 long tons.

[fol. 116] Mr. Rood: The War Food Administrator tried to seize it all, as I recall.

Mr. Blackman: Yes.

Mr. Rood: And Mr. Blackman successfully obtained an injunction against him on the ground that that was beyond the scope of the Requisitioning Act.

(December 16th, p. 37)

[fol. 117] Redirect examination.

By Mr. Blackman:

R. D. Q. 94. Mr. Archibald, you spoke about the effect upon the speculative holders of pepper of this ceiling that was imposed in December 1941. Was there any Government action prior to the war which had the effect of breaking the market?

A. The margin requirements for a contract of pepper on the New York Produce Exchange were increased and that caused a certain amount of liquidation by people who could not afford to put up increased margin or did not want to.

R. D. Q. 95. And the manner in which that was invoked also had an effect, did it not?

A. Yes.

R. D. Q. 96. What was that increase that you speak of?

A. The margin for pepper had been, as I remember it.

about $250 a contract, a contract for 15 tons, and then it was raised to $1000 a contract.

* * * * * * *

[fol. 118] R. D. Q. 100. And that scared out a lot of the speculators?

A. That scared out some.

[fol. 119] (December 16th, p. 39)

Marietta Brown Corbitt, a witness produced on behalf of the plaintiffs, having been first duly sworn by the Court, was examined and testified as follows:

Direct examination.

By Mr. Blackman:

Q. 1. Mrs. Corbitt, what was your business up to a short period or a few weeks or months ago?

A. Handling the accounts of Commodities Trading Corporation.

Q. 4. Yes. But for a firm of accountants?

A. Clarke, Oakes & Greenwood.

Q. 5. That is a firm of certified public accountants in New York City?

A. Yes, sir.

Q. 6. You were an accountant in the employ of that firm for how many years?

A. Well, from 1934.

Q. 7. From 1935 to when?

A. Until December 1946. I mean, until——

Q. 8. Well, until a few weeks ago?

A. Until just recently.

Q. 9. You were recently married?

A. Yes.

Q. 10. Now, Mrs. Corbitt, during that time were the books of Commodities Trading Corporation kept by you?

[fol. 120] A. Yes.

Q. 11. Were they carefully and accurately kept?

A. Yes, sir.

Q. 12. And had you been a bookkeeper for years?

A. Yes, sir.

Q. 13. Will you refer to your records, please, and tell me whether Commodities Trading Corporation sold any white pepper to Argentina and at what times and at what prices?

A. December and January; December 1945, and the prices—were 30.93 and up to 32.31.

Q. 14. Do you know how the company was permitted to sell at that price under the OPA regulations?

A. The OPA regulations, as I recall, was cost plus a percentage, plus certain charges, that is, the cost of getting it to the steamer, etc.

Q. 15. Well, the fact was that we were permitted to make that price so much in excess of the local ceiling price because one of the provisions of the OPA regulation permitted the sale at cost plus certain additions?

A. Yes.

Q. 16. And the pepper had cost us that much or nearly that much, so we were permitted to sell at that price?

A. That is right.

The Court: I wonder when you bought it if it cost you so much.

[fol. 121] Q. 17. Can you tell us when it was bought?

Mr. Blackman: I think it was bought in '33.

A. Well, it was around 1933 or '34 that we bought that high-priced white pepper.

Q. 18. You remember that?

A. Yes, I do remember that.

Q. 19. The cost that the OPA permitted you to charge did not include your carrying charges, warehousing and things of that kind?

A. No, sir.

Q. 20. Just the original invoice price plus these small additions?

A. That is right.

The Court: How much pepper was it that you sold to Argentina at that time?

The Witness: About 35,000.

Q. 21. 35,000 pounds?

A. Yes, approximately.

Q. 22. In two or three shipments, were they?

A. Three shipments, Mr. Blackman.

Q. 23. (continuing) Can you tell me the average import cost of the specific black pepper which was requisitioned by the Government under Army requisition 197 on May 26, 1944?

A. 6.78 cents per pound.

The Court: (to witness) And will you tell us in each case when you bought this?

[fol. 122] A. From '33 through until 1936.

The Court: Is the price that you have given of 6.78 an average price or what?

The Witness: Yes, it is an average price of the various lots.

The Court: Of various purchases made?

The Witness: Yes.

The Court: Is that a weighted average? I mean, did you find not only that you paid so much at such and such a time but so much for so many pounds or tons?

The Witness: So many pounds.

The Court: So that your average is a weighted average?

The Witness: That is right.

Q. 26. Now, Mrs. Corbitt, will you tell me the average import cost of all the black pepper owned by Commodities Trading Corporation at the date of seizure?

A. That was 6.67 cents per pound.

Q. 27. How many pounds did you use in getting at this figure of 6.7?

A. Including the seized pepper, there were 16,153,000 pounds.

Q. 30. Now, Mrs. Corbitt, what was the average import cost of all black pepper which Commodities Trading Corporation owned at December 7, 1941?

A. 6.3549.

[fol. 123] Q. 31. That is, all these figures that you have been giving me are just what we paid for the pepper?

A. That is right.

Q. 32. They do not include handling or storage or overheads of any kinds?

A. No, nothing at all.

The Court: What is the cost of storing pepper per pound per year?

Mr. Blackman: About half a cent per pound. It is about 3 or 4 cents I think a bag per month, and a bag weighs 140, 130, 140 pounds.

Q. 33. That is correct, isn't it?

A. That is correct. Yes, Mr. Blackman.

Q. 34. Mrs. Corbitt, allowing for the prices that you have stated and allowing for warehousing at 3 cents per bag

per month, the insurance that you had to pay, interest at 5 per cent per annum, plus $25,000 per year for total executive costs, rent and overheads of that kind, can you tell me what was the total actual cost to the company of this pepper that was seized?

A. That would be 14.59.

Q. 38. This pepper that we bought was all kept in separate lots and carried on your books in separate lots so that you would know the precise cost to us and how long it was carried with respect to each particular purchase, do you not?

A. Yes, sir.

[fol. 124] Q. 39. We did not lump it together in a pile and sell from the pile?

A. No, sir.

Q. 40. But we kept this pepper separately with respect to each particular lot that we purchased?

A. That is right.

Q. 41. And we know exactly which ones of those lots the Army took when it made this seizure?

A. Yes, sir.

Q. 42. Now, this price of 14.59 that you have given me, is that the average cost of all of our pepper as well as the pepper that was seized?

A. Yes, it would be.

* * * * * * *

[fol. 125] Q. 45. Mrs. Corbitt, would you look at these papers I show you and tell me where you received them?

A. At 80 Broad Street, New York City.

Q. 46. You brought them up and gave them to me this morning?

A. That is right; yes, sir.

Q. 47. And they have been in the office of the Commodities Trading Corporation or Clarke, Oakes & Greenwood since they were received by mail?

A. Yes, sir.

Mr. Blackman: That is all.

Would you just hand them back to me, please.

(Witness hands papers to Mr. Blackman.)

Mr. Rood: What are these. The accounting papers?

Mr. Blackman: No. That is the Government offer to sell us pepper for 75 cents.

Cross-examination.

By Mr. Rood:

X Q. 48. Mrs. Corbitt, you say that you kept separate accounts so as to identify each lot of pepper from the time you bought it, so that when you sold pepper and made delivery you knew exactly which lot you were delivering and you were able to find out how much that lot had cost in your [fol. 126] books; is that right?

A. Yes, sir.

X Q. 49. Now in the case of this particular requisition, who decided which pepper, which lots of pepper were to be turned over to the Army?

A. Well, that was the men in charge of Commodities Trading Corporation, the owners of the pepper.

Mr. Blackman: You did not have anything to do with that yourself?

The Witness: No.

X Q. 50. But you knew that that decision was made in your office and not by the Army?

A. What do you mean? The decision to deliver certain lots of pepper?

X Q. 51. Yes.

A. Well, it had been made, yes.

X Q. 52. By the Commodities Trading Company management?

A. Well, they made their agreements.

X Q. 53. Yes. And they decided which lots of pepper were to be turned over from the warehouses for particular orders such as this one?

Mr. Blackman: Well, Mrs. Corbitt does not know the facts. I will state them for you, if you would like them.

[fol. 127] Mr. Blackman: The facts were these, that the Government wanted to get this pepper and wanted to get it quickly and asked us to facilitate them after they had made their formal requisition and were legally entitled to obtain the material. And we did assist them and got the pepper out so that they could get it. In the warehouse—you see, this was an enormous amount of pepper, 17 million pounds, and it was piled way up to the ceiling, in bags, and some of it was very hard to get at. Now, what we did was to pick out the bags that we wanted them to take and put them in

a position where it was easy for them to take, and then say, "Here you are, you take them." That is what they did.

Mr. Rood: Thank you.

Mr. Blackman: And I am saying, in doing that we did select bags so that we would get an average cost or as near an average cost as we could, so that there would be no question as to whether this was high-priced or low-priced pepper.

X Q. 54. Mrs. Corbitt, I show you some accounting tabulations and ask you if you made those up, these tables or tabulations of cost which the Commodities Trading Corporation submitted to the OPA to support an application to have the ceiling increased?

A. I did make them up.

[fol. 128] (December 16th, p. 56)

Redirect examination.

By Mr. Blackman:

R D Q. 63. In making up the figures that you gave in answer to my questions and in allowing for storage and interest and other carrying charges, including that $25,000, those overheads were applied to all the pepper that we had at the time at the end of each year; is that right?

A. Yes, Mr. Blackman, that is right.

R D Q. 64. Those are not the carrying charges applied against this particular pepper?

A. No.

R D Q. 65. Or only the amount of pepper that we had in April or May 1944?

A. No, that is the inventories on hand.

R D Q. 66. Yes. That is, at one time we had 25 million pounds of pepper; and these charges that you have applied here were divided by 25 million pounds to get the carrying charges for that particular year; is that right?

A. Yes, sir.

[fol. 129] (January 27, 1947, p. 317)

DANIEL C. GRIESHEIMER, produced as a witness on behalf of the Plaintiff, having first been duly sworn by the Commissioner, was examined and, in answer to interrogatories, testified as follows:

Direct examination.

By Mr. Blackman:

1 Q. Would you give your name and address to the stenographer, please?

A. My name is Daniel Cornelius Griesheimer.

I reside—I used to reside in Batavia in Java, in the Netherlands East Indies.

3 Q. How long did you reside there?

A. I came to this country in 1921.

4 Q. And prior to that you lived in Holland?

A. I lived in Holland—Amsterdam.

5 Q. You are a native of Holland?

A. I am a native of Holland, yes, sir.

[fol. 130] 6 Q. What is your business, Mr. Griesheimer?

A. My business in the Dutch East Indies—buying, purchasing and shipping Dutch East India produce, principally spices.

7 Q. And among those spices was pepper included?

A. Pepper was a prominent part of the business.

8 Q. As a matter of fact, pepper is the most important of all spices?

A. Yes, sir.

9 Q. In so far as bulk is concerned, and money value is concerned?

A. Yes.

10 Q. Mr. Griesheimer, in the course of your business and in order to carry it on properly, was it necessary for you to become familiar with the manner in which pepper is grown?

A. Yes, sir. As a matter of fact, business at present is such that it requires constant study and contact with producing centers.

11 Q. Where is black pepper produced?

A. In the southern part of the island of Sumatra.

12 Q. And that is known as what kind of pepper?

A. What is that?

13 Q. And that is known as what kind of pepper?

A. Exclusively black Lampong pepper—L-a-m-p-o-n-g.

[fol. 131] 14 Q. Well, is pepper grown in other parts of the world besides southern Sumatra?

A. It is.

15 Q. Where?

A. Producing places next to the Dutch East Indies are British India and French Indo-China.

16 Q. From what source do we in the United States obtain our black pepper?

A. Especially from the Dutch East Indies.

17 Q. Do we and have we ever, over a long number of years, obtained any substantial quantities from other sources?

A. We did from time to time from British India, if the market situation allowed the pepper to be shipped.

18 Q. How about China—French Indo-China? Do we receive any pepper from there?

A. No, practically never.

19 Q. Where does that go?

A. Because France made the arrangement that on pepper exported from French Indo-China, France has priority, that leads to the fact that practically all pepper goes to France.

20 Q. That is a small producing country as compared to Sumatra?

[fol. 132] A. Sure, sir.

21 Q. How about British India?

A. British India as a rule is producing a substantial crop of pepper; but the situation over there is different from the position in the Dutch East Indies, because the British India native himself consumes a large quantity of pepper, even to the extent that the crop is not sufficient and they have to import it at times.

22 Q. Although British India is the second largest producing center, it is itself in most years an importer?

A. Yes.

23 Q. That is due to the fact that its three or four hundred million people are pepper conscious?

A. Yes; whereas in the Dutch East Indies the native doesn't consume pepper.

24 Q. He raises it all for export?

A. Mostly for export, yes.

25 Q. In the course of your business, has it been necessary for you to follow the market and know what the prices of pepper are?

A. Yes, because our native Dutch is in the market.

26 Q. How long has that been the case?

A. Personally, I got a good deal of interest in pepper as soon as 1924, because I was then appointed as the staff employee having dealings with pepper.

[fol. 133] 27 Q. Are you connected with a firm that deals in pepper—a firm or corporation?

A. Yes, sir. I am the manager of the Catz Java Trading Company.

28 Q. That has headquarters where?

A. In Batavia, with branch offices all over the Dutch East Indies, especially in the Lampong districts, where we have our own buying places for pepper.

29 Q. For how long have you been the manager of that company?

A. I was the manager since 1928.

30 Q. And have you been continuously engaged in that business?

A. Yes, sir.

* * * * * * *

(January 27, 1947, p. 323)

42 Q. Now, will you please describe just generally the growing of pepper—how it is planted, how it is attended to, and how it is harvested?

A. The pepper gardens you will find in South Sumatra, for the majority have been planted out on areas that have [fol. 134] been taken out of the jungle. So, before the native is in a position to plant pepper, he has to clear the jungle, which is a very hard and troublesome work.

If he has obtained that soil, he plants out a pepper, which is a vine, and it takes that vine around four years before it bears fruit. That vine has to climb along a living supporting tree, which the native calls "dadap."

In the meantime, the native has to take the necessary trouble and care that this garden is kept clean, because if he would not do that the jungle would overpower his new plantation in a couple of months. I might even say that for people who do not know the troublesome situation, it

is unreasonable how soon the jungle will reclaim its original territory.

43 Q. Now, you did not start quite at the beginning, I believe, Mr. Griesheimer. Where and how does the native get that living tree on which he trains his pepper vine?

A. He has to plant it. As a matter of fact, he has to keep his eye on two kinds of growth—one, growing his tree, and the other, growing his pepper. He has to make a combination of the two, which means that before he goes out and tries to acquire some soil from the jungle he has to have made already some other work in order to keep all these things together.

44 Q. He has to transplant these trees?

[fol. 135] A. He has to transplant these trees, naturally, and after that he has to plant the vines of the pepper against the trees there.

45 Q. Now, after these pepper vines have lived the three or four years or so and have begun to bear, how long do they continue to bear?

A. This is completely dependent on circumstances, but my experience taught me that the average length a pepper vine lives is around 10 to 14 years, with an average of around 11 years—12 years.

46 Q. On what does that depend?

A. That depends principally on the care that is taken of the vine.

47 Q. If good care is taken——

A. (interposing) If good care is taken of the pepper vine, it might last as long as 14 or 15 years.

48 Q. Even with the best of care, will it last longer than that?

A. No. That is about the utmost a pepper vine can last.

49 Q. So, in order to keep up production of pepper, there must be constant planting of new pepper?

A. Yes, sir.

50 Q. To take the place of the pepper dying out each year?

[fols. 136-137] A. The native must be constantly ready to replace old vines with new ones.

* * * * * * *

[fol. 138] (January 27, 1947, p. 332)

73 Q. Mr. Griesheimer, what effect, if any, did the drop in prices that followed 1929 have upon the planting of new pepper?

A. The effect of the low prices was that the native grower started, or had to neglect the planting of the new gardens and the attention paid to the old ones.

[fol. 139] (January 27, 1947, p. 333)

77 Q. You referred to your making crop estimates. For how long had your company made estimates of the crop before the crop was harvested?

A. Well, I remember that since 1924 we always have been going in the interior and it was more or less a sport on our side to come out with the crop report before other houses.

78 Q. Your company was nearly always the first to come out?

A. Nearly always the first, and I might say with flattering, we have been dealing with established growers in the interior.

79 Q. You send men out through that part of the country to report that condition?

A. Yes; coming out and talking with natives to check the gardens.

80 Q. And, based on that, you have made estimates every year?

A. Yes.

81 Q. And have those estimates proven accurate to a high degree?

A. Yes, sir, indeed.

82 Q. And did you make an estimate for 1941?

A. Yes, sir, we did.

[fol. 140] 83 Q. Were you able to determine how accurate your estimate for 1941 was?

A. Well, we could not determine it because there was a war coming. The Japs came in, but I think my figures, as I issued them, were accurate.

84 Q. What was your estimate for 1941?

A. For 1941 my crop figures were between twenty-five and thirty-five thousand tons at the beginning. But we were more definite later and put a crop of 30,000 tons.

85 Q. How does that compare with the crops that were harvested in the preceding years, say two or three years prior to that?

A. The crop in 1938 and 1937 was rated even up to 50,000 tons—even above that figure.

86 Q. So that was a loss of about 40 per cent?

A. Forty per cent.

87 Q. A loss of about 40 per cent in production.

Well now, does the weather have anything to do with the production of pepper?

A. As a rule the weather has an influence on the pepper, but I remember that during the year 1941 the weather was very well to promote a nice pepper crop.

88 Q. The weather was favorable as you could expect in 1941?

A. The weather was favorable.

[fols. 141-142] 89 Q. Now, if there had been no interference with the natives in the planting of pepper subsequent to 1941, would the production in 1942, 1943, 1944 and 1945 have been greater or less than in 1941?

(January 27, 1947, p. 339).

A. Certainly should have been less, according to my theory.

93 Q. Why?

A. Because in 1942 the yield of the crop was still affected badly by the not planting out of new pepper vines, because of the low prices in 1938.

94 Q. Could anything have been done in 1942 that would have increased the yield in 1942?

A. No, because you had to rely entirely upon what was in the ground, and if people had been making new plantations it would not have been bearing in 1942.

95 Q. Would that condition have obtained in 1943?

A. Maybe during 1943 things might have been changing a little bit more favorably. But I expect that even for 1943 there wouldn't be any pepper crop bigger than 1941. As a matter of fact, with a most favorable situation, the crop would still run around 25,000 tons.

* * * * * * *

[fol. 143] (January 27, 1947, p. 343)

108 Q. Had there been planting of any substantial amount in 1940 and 1941 of new pepper?

A. In 1940, no, sir; certainly not.

109 Q. Had there been any substantial plantings in 1939?

A. No, sir.

110 Q. Or 1938?

A. Certainly not in 1938.

111 Q. 1938 and 1939 was where the low point was?

A. Yes.

(January 27, 1947, p. 349)

144 X Q. Your low pepper prices had come—well, you had a price of 4¼ cents in 1936—is that correct?

A. Yes.

145 X Q. Is that correct?

A. Yes. That might be correct.

146 X Q. And then it had gone up lightly in 1937 and [fol. 144] 1938, and down again in 1939?

A. Yes.

147 X Q. Had these been any planting in the years 1937 and 1938 on that upswing in price?

A. No. There was practically no planting.

(January 27, 1947, p. 350)

150 X Q. There has been some recovery in the prices in 1940?

A. Yes.

151 X Q. And still greater recovery in 1941?

A. In 1941 there was more attention to it, but in the last quarter of 1941 we haven't got much chance to go back to the higher price recovery because there was the war and the freight space for pepper was completely governed by the Government.

152 X Q. What season of the year do they plant the pepper vines?

A. It is the rainy season. That is around the month of January, February, March.

153 X Q. In other words, if they were going to plant as a result of the 1941 price, they would have done it in 1942?

A. They would have started.

154 X Q. And nothing happened in 1942 that you know of? [fol. 145] A. Well, something happened. That was when the Japanese came in the Dutch East Indies.

155 X Q. But nothing happened in planting of pepper?

A. I will give you an answer. It may be, according to the Japanese propaganda, the natives started to plant. But they certainly stopped, because the whole Japanese prosperity, as it was advertised, didn't come to much. Instead of planting pepper, he brought down his vines and starting planting foodstuffs.

[fol. 146] (November 25, 1947, p. 358)

MURRAY SQUIRES, a witness produced on behalf of the defendant, after having been duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. Barnes:

(p. 363)

31 Q. In the course of his testimony in this case, Mr. Catz stated that he had advised the OPA during meetings of that Industry Advisory Committee that the pepper industry could maintain pepper prices, black pepper prices, in the 20¢ to 30¢ price range, if price controls were lifted. Do you remember such representation as made by Mr. Catz?

A. I don't recall the specific instance, but it is my recollection that that statement was made.

32 Q. Was it made by Mr. Catz alone or by other members of the industry as well?

A. It is my recollection that it was the general belief of the industry.

[fol. 147] (November 25, 1947, p. 384)

92 Q. Mr. Squires, under the conditions which actually existed in this country on May 26, 1944, the date of the requisition involved in this proceeding, could any holder of pepper in the United States have sold it legally for any price in excess of the maximum prices set forth in revised Price Schedule No. 52? My question is limifed to whole black pepper.

A. Yes, by those persons who were described as wholesalers.

93 Q. But that was simply another level of price set forth?

A. Not in the same schedule, but in another regulation.

94 Q. In other words, if they met the qualification of wholesalers in Maximum Price Regulation 421, they were—

A. —permitted to sell pepper at prices in excess of the prices of RPS 52.

95 Q. Well, aside from that qualification, if a person was not a wholesaler and could not qualify as a wholesaler under Maximum Price Regulation 421, could he have legally

sold pepper at any prices in excess of those established by [fol. 148] Price Schedule 52?

A. No, he could not.

96 Q. Did Commodities Trading Corporation ever qualify as a wholesaler under the provisions of Maximum Price Regulation 421?

A. As I understand it, they were not able to qualify.

(November 25, 1947, p. 385)

98 Q. Mr. Squires, you spoke of certain talks and agreements or undertakings that took place in informal discussions prior to this increase in the price of pepper to 10¢, which the OPA fixed in October, 1944, wasn't it?

A. Yes, that is right.

99 Q. Now, as a matter of fact, that price was not raised until the OPA and the Department of Agiculture, acting together, had exacted certain agreements or promises from Commodities Trading Corporation with respect to the future sale of pepper held by it. Isn't that true?

A. The amendment was issued subsequent to those talks.

100 Q. Not until those agreements had been exacted?

[fol. 149] A. Well, yes, substantially that is what is was. I didn't want it to sound like a hold-up.

101 Q. And one of those exactions was that Commodities Trading Corporation would sell seven million pounds of pepper at the 10¢ level, which was proposed within the next two or three months?

A. Yes. I don't recall the exact number of months, but that is substantially correct.

102 Q. Doesn't the figure seven million pounds refresh your recollection?

A. I believe it was seven million pounds. I don't recall exactly the figure. It was a substantial amount of pepper.

103 Q. What was said, if anything, so far as you remember about what the other sellers, other owners, of pepper would be expected or required to do?

A. As I recall it, the other holders of pepper were going to be asked to sell in the same proportion as Commodities Trading Corporation.

104 Q. Well, the idea was that all of the holders of pepper would be expected to let go the greater part of their holdings, is that correct?

A. That is correct.

105 Q. And Commodities Trading Corporation did sell seven million pounds of pepper within two or three months [fols. 150-152] after the price was raised, did it not?

A. It is my understanding that they did live up to the agreement.

. . . . . .

[fol. 153] (November 25, 1947, p. 393)

140 Q. Mr. Squires, you said that during this period pepper couldn't be sold in the United States at prices higher than those set forth in Schedule 52. You mean the continental United States, don't you?

[fol. 154] Mr. Barnes: On the record.

A. Within the continental United States.

141 Q. It could be sold at higher prices in Hawaii, Puerto Rico, and Alaska, could it not?

A. Yes. Those territories had regulations of their own governing sales prices.

. . . . . .

[fol. 155] 145 Q. You spoke, Mr. Squires, of the fact that we didn't or couldn't become wholesalers and take advantage of the higher ceiling prices allowed to wholesalers. Why was that?

A. Because I understood you could not meet the requirements of a wholesaler as defined in MPR 421.

146 Q. That is, we had not ground our pepper or packaged it prior to the war?

A. No, sir, that was an entirely different classification. The definition of a wholesaler in MPR 421 did not relate to grinding of pepper but to the type of business in which you were engaged.

147 Q. Yes, and that is, if you had not been engaged in that type of business before the war, you had no right to sell as a wholesaler and obtain the higher ceiling prices that were allowed the wholesaler. Those were part of it?

A. Those were part of it. Those were part of the requirements to set you up as a wholesaler which you had to meet.

148 Q. We could not meet it because that was not the kind of business we had done?

A. Right.

149 Q. We had just imported in great quantities and sold to the wholesalers?

[fol. 156] A: That is correct.

150 Q. Now, as a matter of fact, the wholesalers were able in many cases to sell their pepper at 12¢ a pound or more ground and in barrels at the same time that the ceiling price for bulk dealers, as we were termed, was 6¢—6½¢?

A. For whole pepper.

151 Q. Yes. That is right, isn't it?

A. Yes.

152 Q. Now the cost of grinding is only a fraction of a cent, isn't it?

A. It is a small amount, yes, sir.

153 Q. It is less than half a cent a pound. And you were asked by Mr. Barnes about whether that wholesale price didn't include the cost of distribution and advertising and things of that kind. The situation during 1943 was such that, if anyone had given notice that he had a few thousand pounds of pepper to sell, a line would form outside of his place, wouldn't it?

A. Yes, that is right.

154 Q. Mr. Squires, during this period of great stringency, 1943, 1944, there was a product put on the market by large spice dealers and sold in substantial quantities that was called by various names, such as synthetic pepper or substitute pepper or imitation pepper, was there not?

A. Yes, there was quite a business done in that.

[fol. 157] 155Q. That commodity, or whatever you may call it—product—was made up usually of about one-fourth or one-fifth real ground black pepper and the remainder was parched corn or wheat or some neutral agent, was there not?

Mr. Barnes: Object to this as being beyond the scope of direct examination and upon the further ground that it relates to a subject already excluded by the Commissioner from proof in this case, and, if it is satisfactory to you, without repeating it, I would like to have it understood that that exception runs to this entire line of examination, Mr. Blackman.

A. Yes, that is true. May I add that it was also made of cottonseed hulls.

156 Q. Now that pepper was sold during that period at prices of 16¢ a pound and better, was it not?

A. Yes, that is approximately correct.

157 Q. At the same time that the ceiling price on the real pepper was 6½¢?

A. No, sir. Six and a half cents relates to whole pepper, not ground pepper.

158 Q. Yes. At the same time the whole black pepper was selling at 6½¢?

[fol. 158] A. That is right.

* * * * * * *

[fol. 159] 180 Q. You are familiar, are you not, with the [fol. 160] characteristics of pepper-growing, the length of time it takes between the planting and the bearing of pepper?

A. As I recall from what I read, it is about four years to maturity, isn't it?

181 Q. About six to seven years is my information, I believe.

A. I thought you meant from the time of planting to bearing. That is the age you are speaking of, isn't it?

182 Q. No, I am talking about from the time of planting to bearing—I mean substantial bearing. I think they get the first crop in about four years.

A. Yes, that is what I meant, from planting to bearing is about four years, but life about seven, I thought.

183 Q. You don't mean total life of seven?

A. Total bearing life of six—seven.

184 Q. That is substantially correct, but it doesn't reach its full normal production until about six or seven years.

A. That is correct.

185 Q. Now don't you know, as a matter of fact, that those three facts, the abnormally high price, the large plantings due to high prices, and the long time that it takes to gather the pepper after the vines are planted, resulted in the largest production the world has ever known in 1934, [fol. 161] 1935, 1936, and 1937?

A. I understand that it resulted in very heavy production. Whether or not it is record production I am not certain.

186 Q. But it was an abnormal production period?

A. Yes, abnormal.

187 Q. Do you know what effect the very low prices that obtained in those years had upon the planting of pepper?

A. Only a hearsay again, that it resulted in fewer plantings and poorer care of the vineyards or the plantations.

Mr. Barnes: Object, and move that it be stricken, on the ground that it is hearsay.

188 Q. Well, the reasonable price of pepper and the conditions that you had to deal with in the OPA were influenced by that kind of thing, were they not?

Mr. Barnes: What kind of thing, Mr. Blackman?
Mr. Blackman: The dearth of pepper.

189 Q. Why did you increase the price of pepper to 16¢ ultimately?

A. That was to secure supplies of pepper.

190 Q. And because you knew the dearth of supplies throughout the world?

A. Yes, that is right. No. Let's say available supplies, [fol. 162] because we don't know what there was in, say, the Dutch East Indies.

191 Q. Well, you had a pretty good idea, didn't you?

A. No, sir, we don't know today.

192 Q. You don't know exactly, but don't you know that the pepper was shipped out of the Dutch East Indies just as fast as they could possibly ship it for a year before the war?

A. Yes, I know that.

193 Q. In other words, they saw war coming and they wanted to dump their pepper on us. Is that right?

A. I presume that is correct, yes.

194 Q. Well, you know. You have made a study of this thing. You know that is a fact, don't you?

A. Yes, I think so.

* * * * * * *

[fol. 163] 201 Q. Do you know that when the war seemed to be fairly im-inent and a year or so before the war, before Japan got into the war, there was a large amount of buying of futures of pepper?

A. Yes, there was.

202 Q. And the market went up very rapidly from about 3¢ to, oh, nearly 8¢, wasn't it?

A. Three years prior to 1941 or 1939? You said prior to the war.

[fol. 164] 203 Q. Prior to 1941?

A. No, sir.

204 Q. I think it was in 1939 and 1940.

A. I was just trying to reconcile that with the records here.

205 Q. Yes, surely. Your prices there will show when it happened.

206 Q. I see by this chart that it went up from 3.8¢ in the latter part of 1940 to 7.2¢ in May, 1941. This is the period that I had in mind. The spread I gave was a little larger than the figures bear me out. Now that was due to a large number of persons in the United States buying pepper against the possibility of war. Is that right?

A. Yes, during that period there was a general acquisition of all merchandise, including pepper.

207 Q. And do you know what steps, if any, Mr. Leon Henderson, who was Price Administrator at that time, took to depress the price or stop that speculation?

A. In August, 1941, the Exchange was asked to raise its margin requirements.

208 Q. Well, quadrupled them, wasn't it?

[fol. 165] A. It was made $1,000; I think that it quadrupled, yes.

209 Q. Previously it had been $250 a contract and then Mr. Henderson cracked down, as he expressed it, and demanded that they raise the price from $250 to $1,000. Wasn't that it?

A. Yes, I understand those are the approximate figures.

210 Q. And he also at that time gave notice to persons who were buying commodities that they would not be allowed to make war profits?

Mr. Barnes: That was before you went with the OPA, was it not, Mr. Squires?

The Witness: That was before my time, yes.

Mr. Barnes: I object to it on the ground that it is hearsay.

Mr. Blackman: I think the witness is competent to state on that. It is part of the history of his department. You have asked him many questions with respect to matters previous to his connection with it. I will ask for the answer, and, if the Court doesn't want it, all right.

A. There were warnings, yes, issued by the Price Administrator.

211 Q. Now, Mr. Squires, you have stated that the price [fol. 166] or the cost rather to Commodities Trading Company is shown in a letter of the OPA and was in agreement

with what you found from your examination of the books of Commodities Trading Corporation with respect to the cost to it of the pepper that it had on hand. Now what basis for computation did you use there?

A. First in and first out.

212 Q. That is, you didn't find any inaccuracies in the accounts of Commodities Trading Corporation?

A. None whatsoever.

213 Q. But their books showed a cost of their pepper two or three times or three or four times the cost that you developed?

A. Depending on the method of accounting used.

214 Q. Yes, and the difference was due to the difference in accounting method?

A. That is correct.

215 Q. Now what you did was to take what is known in accounting as the first in, first out method?

A. Yes, sir.

216 Q. And every ton of pepper that was sold by Commodities Trading Corporation you assumed or offset against the earliest purchase of pepper that it had on hand when it made that sale?

A. In effect, yes, that is right.

[fol. 167] 217 Q. And in so doing you developed a loss of hundreds of thousands of dollars by Commodities Trading Corporation with respect to the pepper that it had bought at 6¢ and 7¢, 5¢, 6¢, and 7¢, in the earliest years of its dealings. Is that right?

A. No, that is not correct, because our accounting period did not go that far back.

(November 25, 1947, p. 412)

249 Q. Mr. Squires, referring to your work sheets, will you please describe briefly how you proceeded to develop the average cost of the pepper that we had on hand in 1944?

A. Beginning with the date of February 3, 1942, we worked backward.

250 Q. Wait a minute. Beginning with the date of February 3, 1942?

A. Yes.

251 Q. You computed that we had on hand at that time how much pepper?

A. We computed that you had on hand 19,545,830 pounds of pepper, of whole black pepper.

252 Q. Then starting with that figure, what did you do next?

A. We recorded all purchases beginning on February 3, 1942, and working backward until a total record of pur-
[fol. 168] chases of 19,545,830 pounds had been recorded.

253 Q. And when did you stop by that method, what date?

A. September 24, 1936, which appeared to be the earliest purchase taken.

254 Q. Well, you knew, as a matter of fact, that a very large proportion of the pepper that we had on hand in 1944 had been purchased before that date?

A. Yes, that is right.

255 Q. But you took no account of what we actually paid for the pepper bought prior to the date you have stated?

A. We took no account of it.

257 Q. Yes, but your procedure not only did not take into account what we paid for pepper bought prior to 1936 or to
[fol. 169] your date in 1936—I think it was September, 1936—and still on hand, but it would not take account either of the storage charges and other overhead costs that we had in connection with that pepper from 1933 to September, 1936?

A. No, sir, it would not take into account that storage.

Redirect examination.

By Mr. Barnes:

258 Q. Mr. Squires, just one or two questions. You referred during the course of your cross examination to a chart that was attached to one of the plaintiff's claims. The chart you referred to is attached to Defendant's Exhibit 2, and is marked Exhibit B. It is a large photostat of The Economic Factors Affecting Prices of Black Pepper During the Fifty-one Years, 1890-1941?

A. Correct.

(November 25, 1947, p. 415)

261 Q. Now I just want to clarify a few points with respect to this audit, Mr. Squires. You have described how, by the application of the first in and first out rule, you computed the cost to the plaintiff of the 19,545,830 pounds of pepper, and I take it that you added to that the charges or allowances for storage, interest, and loss of weight—is that correct—and weighing out?

[fol. 170] A. Yes, that is right.

262 Q. And that gave you the total figure which appears on the second page of the letter or the additional charges of .006232 dollars per pound, which appears on the second page of the letter?

A. That is correct.

263 Q. And allowing for those, the cost to the plaintiff of its pepper you computed at slightly over six and one-tenth cents a pound on October 4, 1943?

A. Yes, that is right.

* * * * * * *

Recross-examination.

By Mr. Blackman:

264 Q. Those additional costs concerning which you have just testified in answer to Mr. Barnes didn't include anything for so-called general overhead, such as rent or salaries of officers or anything except what are known as direct costs?

A. The- did not include the indirect costs which you mentioned.

265 Q. Nor anything for interest?

A. Yes, interest is included.

266 Q. At what percent?

A. Interest, twenty months at ⅛ percent per month.

* * * * * * *

[fol. 171] 272 Q. That would be one and a third percent a year?

[fols. 172-173] A. Yes. That was also because of the interest rates as shown in your letter of February 15, 1944.

273 Q. Those interest rates were the interest rates that we were actually paying.

A. Well, I presume so.

274 Q. Yes. Now you know, however—rather, you knew that the banks were not lending us money on any such low rates of interest on this pepper. The banks had guarantees of all the officers of the company, whose combined wealth was, oh, upwards of ten million dollars, and they also had Stock Exchange collateral up in addition to the pepper. Each one of us put up his percentage of the amount due the bank and the stock, the Stock Exchange Collateral. You understood that was the way?

A. Of Course. That, of course, is the cost of the loan.

* * * * * * *

[fol. 174] JOHN W. KONVALINKA, produced as a witness on behalf of the plaintiffs, having first been duly sworn by the Commissioner, was examined and, in answer to interrogatories, testified as follows:

Direct examination.

(p. 431)

By Mr. Blackman:

1 Q. Give your name and address to the reporter, please, sir.

A. John W. Konvalinka. My address is 233 Broadway, New York, care of Irving Trust Company.

2 Q. Mr. Konvalinka, what is your business?

A. I am Vice-President of the Irving Trust Company.

4 Q. For how long have you held that position?

A. About nine years.

5 Q. And for how long have you been in the banking business?

A. Over 30 years.

6 Q. For how long have you been connected with the Irving Trust Company?

A. Over 30 years.

[fol. 175] 7 Q. What have been your duties, Mr. Konvalinka?

A. Well, my specific duties have been the loaning of funds on credit.

8 Q. And in connection with that, do you determine the interest rates to be charged?

(p. 432)

A. We are aware of the market interest rates on all types of loans.

9 Q. Are they regular market rates, competitive market in New York?

A. Yes.

10 Q. The banks compete with each other for good loans?

A. Yes.

Mr. Barnes: And bad ones, too, sometimes.

Mr. Blackman: Well, they do not compete for the bad ones.

11 Q. And for how long have those been your duties, Mr. Konvalinka?

A. Oh, about 20 years.

12 Q. And have you been familiar with those market rates for as far back as 1933?

A. Yes.

13 Q. Does your bank loan and is it one of the large lenders on commodities?

A. We do.

[fol. 176] 14 Q. On what kind of commodities do you loan? Just mention a few of them.

A. Well, we principally loan on commodities such as butter, eggs, poultry. Those are the principal commodities.

15 Q. Did you loan to the Commodities Trading Corporation on its pepper?

A. Yes, we did.

(p. 433)

16 Q. And was the pepper that is the subject of this action pepper upon which you had made a loan and held a loan?

A. Yes.

17 Q. For how long have you been familiar with the market rates of interest on loans on commodities?

A. About 16 years.

18 Q. Will you please state what those market rates were, beginning, say, with 1933?

Mr. Barnes: I object to this as being completely immaterial.

(p. 437)

Commissioner Gyles: As far as I am concerned, I will limit it to the interest actually paid—not what the market was. That is the ruling, and you are entitled to an exception, and you are entitled to state in a concise form your proposal to prove by this witness if he were allowed to testify.

[fol. 177] Mr. Blackman: I respectfully except, your Honor.

And I propose to prove by this witness that the market rate for interest on a loan on whole black pepper would not have been less than five per cent at any year from 1933 to 1947 both inclusive, which is the period that the bank loaned on this pepper.

(p. 438)

Commissioner Gyles: All right, sir. You have finished that. Let us go on to something else.

By Mr. Blackman:

19 Q. Now, Mr. Konvalinka, your bank, you said, did loan to the Commodities Trading Corporation on this pepper?

A. Yes.

20 Q. What security did you have for that loan?

A. Well, first, we had the pepper. Then we had a margin of 25 per cent in first-class securities.

21 Q. Stock Exchange securities?

A. Stock Exchange securities.

22 Q. Stocks and bonds?

A. Stocks and bonds.

. . . . . .

[fols. 178-180] (p. 439)

24 Q. Were these stockholders who gave you the guarantees good for the amount that they guaranteed, according to the information of the bank?

A. We knew the guarantors were amply responsible for the guarantees.

(p. 440)

25 Q. Mr. Konvalinka, were those stockholders of the Commodities Trading Corporation large depositors with your bank throughout this period?

A. Yes, they were.

27 Q. To what extent were they depositors with your bank?

A. The affiliated balances of those interested in this company at the time these loans were on our books averaged upwards of $500,000.

. . . . . .

[fol. 181] (p. 451)

Edward L. Blackman, a witness produced by the plaintiffs, having first been duly sworn by the Commissioner, testified as follows:

Colloquy Between Counsel and Commissioner

Mr. Blackman: The testimony given by the company has been that there

[fol. 182] (p. 452)

were upwards of seventeen million pounds of pepper held by it at the outbreak of the war. At the last hearing Mr.

Squires, a Government witness, testified that he had examined the books of the company and that the company had a larger amount of pepper than seventeen million pounds. I forget the exact amount.

I am familiar with the situation. I was very active in the management of this company, and the explanation of the difference is this: We had twenty-one million pounds of pepper at the outbreak of the war; but we had sold four million pounds, and our witnesses testified to the net amount of pepper that we had and not the gross amount. We had sold four million pounds for future delivery, and that was the situation in December, 1941. We delivered two million pounds of that pepper, and in March, 1942, at which time the Government witnesses testified to quantities, we actually had in our possession nineteen million pounds of pepper. But we had commitments which we had made prior to the outbreak of the war for the sale of two millions more, which brought us back to the seventeen millions that the company witnesses have testified to throughout.

Now, I wish to introduce in evidence offers that the Government made to me and to all the stockholders of Commodities Trading Corporation in November, 1946, offering to sell to us certain large quantities of pepper for 75 cents per pound.

[fol. 183] Mr. Barnes (p. 453): I object to any proof with respect to offers, your Honor, as not being competent evidence of value. And I further object on the ground that this is something which relates to transactions which took place two and a half years after the requisition.

Commissioner Gyles: These offers were mere offers?

Mr. Blackman: These were offers——

Commissioner Gyles (interposing): Not sales?

Mr. Blackman: No, sir.

Commissioner Gyles: We cannot receive the offers—mere offers.

Mr. Blackman: This offer was accepted by me. I never got the pepper. I will explain that. But this offer was accepted by me.

Commissioner Gyles: Well, if it was an offer that was accepted, that may throw a different light on it. Under the ruling of the Supreme Court, we understand that offers do not go in.

Mr. Blackman: This is not an ordinary offer. This is an offer by the Government itself to sell us back this pepper for 75 cents per pound.

Commissioner Gyles: You accepted it?

Mr. Blackman: I accepted it.

Commissioner Gyles (p. 454): What is the objection to that, Mr. Barnes?

[fol. 184] Mr. Barnes: Until we find out more about this —he said he never got the pepper, and there may not be a completed contract. It is still a transaction two and a half years after the requisition. The requisition took place in March, I think, of 1944.

Commissioner Gyles (p. 455): You go ahead and make your proposal of proof.

Mr. Blackman (p. 457): I ask to have marked for identi-

[fol. 185] fication this paper dated November 16, 1946.

(The document, dated November 16, 1946, above referred to, marked "Plaintiff's Exhibit No. 5 for identification," is filed in connection with this case.)

Mr. Blackman: I wish to prove, your Honor, that this paper was received by me through the mails in the regular course; that prior to its receipt I had had conversations with Mr. Pryor, who was in charge of the Spice Division of the Department of Agriculture, and he told me that such an offer as is disclosed by this paper would be made; and I discussed with him the number of pounds of pepper that each of the stockholders of Commodities Trading Corporation would be entitled to purchase; this offer was being considered an offer of importance and of value to the persons to whom it was made; I accepted by telegraph the offer that came to me and complied with the preliminary directions.

Now, on that statement, I will offer the paper in evidence.

Commissioner Gyles: It may be marked for identification in connection with the proposal of proof.

Mr. Blackman: Is it rejected, sir?

Commissioner Gyles: It is rejected and marked for identification.

* * * * * * *

[fol. 186] Mr. Blackman: I also offer in evidence similar papers which were received at the same time by other stock-

holders of Commodities Trading Corporation in amounts that had been agreed upon between Mr. Pryor and myself. I offer the paper and the covering letter of Mr. Pryor. I haven't them all here, but I offer three of them as samples.

Commissioner Gyles: Admitted for identification. Mark them for identification in connection with the proposal of proof.

Mr. Barnes: I would like to add to my objection with respect to these that they have not been proved. They are addressed to persons other than Mr. Blackman and those persons are not in court, and an offer of proof cannot be made as to what they would testify to. I want to make my position clear in the record.

(Offers to stockholders, and the covering letter from Mr. Pryor, above referred to, marked "Plaintiffs' Exhibits Nos. 6-A, 6-B and 6-C for identification," are filed in connection with this case.)

Mr. Blackman: I wish to state that these papers are the identical papers that were produced by Mrs. Corbitt at the hearing in New York to which I referred, and have been in my possession ever since.

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[fol. 187] (p. 463)

Now, pursuant to our stipulation, I offer in evidence the affidavits filed by the Government in connection with the injunction suit to which we have referred.

• • • • • • •

[fol. 188] Commissioner Gyles: I do not want the affidavits, anyway. I want the proof.

Mr. Blackman: These are admissions under oath by Government officials of the facts which I wish to prove.

Commissioner Gyles: Well, bring the witnesses in court.

Mr. Blackman: That would be impossible, almost, at this time. They are scattered. The OPA is disbanded. But these affidavits are statements under oath by the people selected by the Government in charge of these matters.

Commissioner Gyles: I think maybe you had better just take an exception and file them for identification. I do not want to receive affidavits in this. I want testimony.

Mr. Blackman: Your Honor, we are not offering these as our affidavits in place of the sworn testimony of a witness

before your Honor. But this is an admission under oath by a Government official with respect to the very matters [fol. 189] that are in dispute here. That is certainly competent evidence in any court.

Commissioner Gyles (p. 466): I do not know. I will rule just as I have ruled, that they are rejected, and I will study the things. They will be here for identification, and I will see what conclusion I later reach. But I do not think they are acceptable.

If you have evidence that the Government has, make the call on the Government to get the original documents, or call witnesses to testify.

Mr. Blackman: Mr. Barnes does not make any objection that these are not the original documents. He has furnished these to me himself.

Commissioner Gyles: Well, as I understand it, the objection made was on the ground that it is not the best evidence.

What is your objection, Mr. Barnes?

Mr. Barnes: That is right, sir. That is one of the grounds of my objection.

Mr. Blackman: You do not object that these are not originals, but are copies.

Mr. Barnes: I admit that these are true copies of the affidavits in question.

• • • • • • •

[fol. 190] (p. 467)

Mr. Blackman: I offer in evidence affidavit of Ralph W. Olmstead, verified 25th day of March, 1944, and attached to stipulation between the parties, together with the exhibit attached to his affidavit.

(p. 468)

So, if I may, I will offer the affidavit of Fletcher H. Long, verified the 3rd day of March, 1944, another of the affidavits in this Paragraph K of our stipulation.

[fol. 191] I offer the affidavit of Carl A. Hardigg, Brigadier General, Quartermaster Corps, verified the 28th day of March, 1944.

I offer the affidavit for E. F. Ney, Captain of Supply Corps of the Navy, verified the 25th day of April, 1944.

I offer the affidavit of Harold C. Albin, Chief of the Special Commodities Branch, Office of Distribution, Food Administration, verified the 15th day of May, 1944.

Mr. Barnes: I assume that you include with that the attachments referred to.

Mr. Blackman: No.

Mr. Barnes (p. 469): Your Honor, I object on the ground of incompleteness.

Commissioner Gyles: If you put in the affidavits, I am going to read the affidavits. (p. 469)

Mr. Blackman: Surely. But I am offering the affidavit encloses something.

Mr. Barnes: I made the further objection on the ground that Mr. Blackman is offering only a partial document, and I object under the rule of completeness.

Commissioner Gyles: If they are considered, they will be considered—the whole thing. I will not consider a piece of an affidavit.

Mr. Blackman: I am offering the entire affidavit. He has a statement enclosing a letter which has no materiality to my case.

[fol. 192] Mr. Barnes: Your Honor, on the record, very briefly, Mr. Blackman stated he did not want to offer all of these. Except for the omission of the exhibits to this last affidavit, he has offered every document included in this exhibit, except one one-page affidavit.

Mr. Blackman (p. 471): That is my case, with this exception, that if your Honor rules out the affidavits of these Generals and Captains——

Commissioner Gyles (interposing): I have already ruled them out. The only question I have is to study them, with the idea that I may possibly decide to rule them in.

Mr. Blackman: Then I would like to reserve the right to call these people and produce them here.

[fols. 193-196] Mr. Blackman (p. 472): But I stated that I was closing subject to that matter.

Commissioner Gyles: You cannot close subject to what I may determine in studying the case. If you have testimony to offer, offer it.

Mr. Blackman: I respectfully except.

Commissioner Gyles: You have excepted.

Mr. Blackman: But I am excepting to this ruling also. It seems to me that that is putting an unfair burden on me.

Commissioner Gyles: No, sir. The burden of proof is on you, and I have already ruled them out. If you have other evidence, go and get them. I am not shutting you out. But get them now.

Mr. Blackman: I cannot get them today.

Commissioner Gyles: You may not be able to get them today; but get them quickly.

Mr. Blackman: Do you wish to put me to all the trouble and the Government officials to all the trouble of being called?

Commissioner Gyles: I am only making the ruling. I cannot help what the effect of the ruling is.

Mr. Blackman: Can we not wait until you have made that ruling?

Commissioner Gyles: No; because I have to study those affidavits in connection with the case.

* * * * * * *

[fol. 197] (p. 476)

Mr. Barnes: I would now like to offer Defendant's Exhibit Number 3, which is a letter to the plaintiff from the Administrator of the Office of Price Administration, dated March 11, 1944. This relates to the petition which you have just rejected—is a formal rejection of that. I am offering this as part of that transaction, but, in addition, for another purpose.

The witness who testified in New Orleans stated that this document set forth accurately the results of an audit which he conducted of plaintiff's books with respect to the

[fol. 198] (p. 477)

cost of this pepper to plaintiff; and this letter sets forth in summary form his findings; and I am offering it for that dual purpose.

Commissioner Gyles: One minute! That is an audit?

Mr. Barnes: Yes, sir.

Commissioner Gyles: And it was introduced, I presume, or offered. Did you have the man on the stand who made the audit?

Mr. Barnes: Yes, sir.

Commissioner Gyles: That would admit it in evidence. It would not be admissible without his being on the stand. It is admitted.

Mr. Blackman (p. 478): May I state my objection?

Commissioner Gyles: Yes.

Mr. Blackman: This letter is a self-serving declaration by the head of the OPA, and the audit of which Mr. Barnes speaks was not an audit in any proper sense, and was so

stated by the witness. He did not take the cost of our pepper, nor did he follow any recognized system of bookkeeping. He testified that what he did was to take the amount of pepper that we had on hand at the beginning of the war, and in March, 1942, and he found that there were nineteen million pounds, and he went back, took 19,000,000 pounds of purchases and added them up and took that as the cost of the nineteen million pounds that we had, which was ridiculous.

[fol. 199] (p. 478)

Commissioner Gyles: Well, it may be; but I do not think the objection excludes the papers. It goes to the weight of it. We might not be able to give any weight to it.

Mr. Blackman: But I think it goes further than that. This paper is a self-serving declaration from the OPA to us.

Commissioner Gyles: That will affect its weight. The Court may not give any weight to it. It may give light weight to it. We are supposed, in studying these papers, to know what to do with them.

Mr. Blackman: Of course, sir. But this has no weight.

Commissioner Gyles: I cannot exclude it if the man was on the stand who made it. I will let that go to the weight. Just make your exception. (p. 479)

Mr. Blackman: All right. I except.

(The document previously marked for identification as Defendant's Exhibit No. 3 and filed in connection with this case, was at this point received in evidence.

Mr. Barnes: Your Honor, I would now like to offer Defendant's Exhibit Number 4, a letter to the Office of Price Administration, signed by Mr. Edward L. Blackman, dated October 28, 1943, and, as part of the exhibit, the attachments to the letter, including an application for adjustment of maximum price for goods sold under Government contracts, and asking for the establishment of a ceiling price with respect to prospective sale of one million pounds of black pepper to the War Department.

[fol. 200] (p. 479)

I might say, your Honor, in these applications the plaintiff is asking for the establishment of a price at which it indicates it would be willing to sell, which is substantially lower than the price it is seeking in this suit. These are practically contemporaneous applications filed by the plain-

tiff, and it is asking for a price substantially lower than the price it is seeking here. I think they are definitely material and relevant documents.

Commissioner Gyles: Now, these are letters by the plaintiff. You had a witness on the stand who had these letters and you offered them through this witness, or how

(p. 480)

were they offered? I want to find out why cross examination was not had.

Mr. Barnes: These documents were offered through the OPA, the man who received them and who acted upon them, and he stated that he received them and the action which he took with respect to them.

Commissioner Gyles: I think I would have to receive those. The man who received the letters was on the witness stand and subject to cross examination. That makes them admissible in evidence, does it not?

Mr. Blackman: I think not, sir. These were letters which we sent for an entirely different purpose. We stated that we did not wish to dispose of any of our pepper, that we felt it was a wonderful investment and we wanted to keep it; but that the Army had notified us that it was in need of

[fol. 201] (p. 480)

this pepper and we asked permission to sell to the Army at the price which the Army offered us, and that was denied.

Commissioner Gyles: I think, under the circumstances, that is competent testimony so far as the admissibility is concerned. Now, the weight to be given to it is something else.

Mr. Blackman: Well, your Honor, it cannot be admissible except, it seems to me, for the purpose of contradiction.

Commissioner Gyles: Well, it may be that——

Mr. Blackman (Interposing): How does it contradict our claim here for us to say we are willing to be gracious and public spirited and sell to the Army at the price they are willing to pay us? (p. 481)

Commissioner Gyles: I understand that part of it. But I think where you have the man on the stand to whom it was written, concerning the price of the commodity, it may have some weight.

Mr. Blackman: I did not have the man on the stand. Mr. Barnes put the man on the stand. What could I have asked him concerning my own letter?

Commissioner Gyles: I do not know. I admit the letter.

Mr. Blackman: I respectfully except.

Commissioner Gyles: Yes, sir.

(The document previously marked for identification as Defendant's Exhibit No. 4, and filed in connection with this case, was at this point received in evidence.)

[fol. 202] Mr. Barnes (p. 481): I should now like to offer Defendant's Exhibit Number 5 for identification, which is another petition for adjustment of the OPA price ceiling.

Commissioner Gyles: Is it the same situation?

Mr. Barnes: Filed by the plaintiff—yes, sir. This was filed shortly after the requisition involved, on August 16, 1944.

Commissioner Gyles: When was the requisition?

Mr. Barnes: May 26, 1944.

Commissioner Gyles: Well, we will receive that, with the same condition.

(p. 482)

Mr. Blackman: May I say just a word?

Commissioner Gyles: Yes.

Mr. Blackman: That is a comparable document to the first one which Mr. Barnes offered, and which you did not receive. It is an application petition to the OPA for an increase in price.

Now, of course, an increase in price by the OPA is based on entirely different considerations from that to which we are entitled in a court of law. We told them what a hard position we were in, and asked them to give us a little relief. We knew they would not give us what we thought we were entitled to. It seems to me that that is entirely irrelevant. It is no contradiction of anything we have claimed here.

Commissioner Gyles: Unless it affects and bears upon the price, it will not affect the Court. That is the only question I have, as I understand it. Unless it binds plain-[fol. 203] tiff in some way in connection with the price of the commodity at that time—the value at that time—it will not help the Court any. I propose to measure all of these things by that.

Mr. Blackman: That has not a word about the value at that time.

Commissioner Gyles: Then it will not harm you if it is in.

Mr. Blackman: No, sir, except that we want to restrict the record.

Commissioner Gyles (p. 483): Well, I am not so much worried about restricting the record as I am in getting enough evidence to find out what the true value of this pepper was. That is the only thing that concerns me.

I will receive those things on that basis.

Mr. Blackman: I respectfully except.

(The document previously marked for identification as Defendant's Exhibit No. 5, and filed in connection with this case, was at this point received in evidence.)

[fol. 204] (p. 491)

Commissioner Gyles: I believe this hearing was called this morning for the purpose of hearing any further proof that plaintiffs have to offer.

Mr. Blackman: Yes, sir.

(p. 492)

The plaintiff, unfortunately, has no further proof. We were unable to obtain the presence of the witnesses that were referred to at the last hearing. I received a very courteous letter from the Attorney General stating that he had ascertained that Colonel Olmstead, who was my principal witness, who was the man that authorized requisition of this pepper in New York, and who had to comply with the regulations before doing so—and he swore that he had so complied, including having made all reasonable efforts to purchase the pepper, without success—that he was in China at the present time, so I shall not ask delay to get his testimony.

I found, after some difficulty, that Mr. Albin, who was second in command to Colonel Olmstead, and who was with the War Food Administration at the time the pepper in question was seized, or sought to be seized—that he was still with the Department of Agriculture. For three days I called his office several times a day and was told that he was there but that he could not speak to me at that time, that he was engaged but would call me back. He never called back, and yesterday I called again and was told that

he had left his office yesterday morning about 10 o'clock, that he had left

[fol. 205] (p. 492)

his office for the day, and that he was leaving the city in a few hours and would be gone for several days:

In view of the fact that I have reviewed this testimony and I think the plaintiffs' witnesses called on the main case have probably sufficiently covered the matter, I shall

(p. 493)

rest on that, and on the hope that the Commissioner may finally decide that these affidavits are admissible in evidence, and I shall not ask any opportunity to call any further witnesses.

Commissioner Gyles: Very well, sir.

[fol. 206] IN THE COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

STIPULATION OF FACTS

Paragraph 15 of above Stipulation of Facts between the Parties

15. On or about March 10, 1944, the United States, acting through the War Food Administrator, requisitioned and took possession of approximately 3,964,800 pounds of whole pepper allegedly owned by plaintiff. On or about March 22, 1944, plaintiff instituted an action in the District Court of the United States for the District of Columbia, entitled "Commodities Trading Corporation, a Delaware corporation, 80 Broad Street, New York, N. Y. against Federal Surplus Commodities Corporation; Claude R. Wickard, Individually, and as Secretary of Agriculture; Marvin Jones, Individually and as War Food Administrator; Lee Marshall, Individually and as Director of Supply, Office of Distribution, War Food Administration; Ralph W. Olmstead, Indi-

[fol. 207] vidually and as Deputy Director of Supply, Office of Distribution, War Food Administration; Fletcher H. Long, Individually and as Chief of Spice Section of Special Commodities Branch of War Food Administration; H. C. Albin, Individually and as Chief of Special Commodities Branch of War Food Administration; and Irving Trust Company," being Civil Action No. 23573, praying for an

injunction to prevent the removal of the requisitioned pepper, on the ground that such requisition was not authorized by the Act of October 16, 1941, under which such pepper was purportedly requisitioned, in that said pepper did not constitute "military or naval equipment, supplies, or munitions, as component parts thereof, or machinery, tools or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions," and that it was requisitioned for civilian use rather than for the defense of the United States.

An answer on behalf of the governmental defendants and a motion for summary judgment on their behalf were filed in such action on or about May 22, 1944. Filed herewith, marked Joint Exhibit "K", and by this reference made a part hereof, is a true and correct copy of such motion for summary judgment and of the affidavits filed in support thereof.

Defendant specifically objects to the materiality or relevance in this proceeding of any of the facts stated in this paragraph 15, or of any of the documents contained in [fol. 208] Joint Exhibit "K". Its only purpose in making this stipulation is to simplify plaintiff's proof thereof in the event that this objection is overruled.

The Following Portions of the Affidavit of Fletcher H. Long, One of the Papers Contained in Joint Exhibit "K" Referred to in said Paragraph 15 of Stipulation of Facts.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 23573

COMMODITIES TRADING CORPORATION, Plaintiff,

v.

FEDERAL SURPLUS COMMODITIES CORPORATION, et al., Defendants

AFFIDAVIT

DISTRICT OF COLUMBIA,
City of Washington, ss:

Fletcher H. Long, being first duly sworn, deposes and says that he is Chief of the Spice Section of the Special Commodi-

ties Branch of the Office of Distribution (formerly Food Distribution Administration), War Food Administration, a part of the United States Department of Agriculture and that he has been Chief of this section since April 1943. Prior to that time affiant was associated with McCormick & Co., [fol. 209] Inc. of Baltimore, Maryland, the largest spice and extract company in the United States. Affiant was manager of the spice department and was with that company for 26 years. Affiant further states that one of the commodities handled by the Spice Section of the Special Commodities Branch is pepper, both black and white, and that in connection with handling this commodity, the Special Commodities Branch has the responsibility for recommending the issuance of food orders under the Second War Powers Act to regulate the industry and also has the responsibility for procuring necessary stocks of pepper in the form required for lend-lease shipments to foreign countries.

* * * * * * *

The following statements relative to the importation, use and regulation of pepper are known to the affiant to be true:

1. In the United States there are approximately 85 brokers and agents handling pepper, approximately 56 dealers handling pepper and 107 grinders or packers. The dealers normally import stocks of pepper, the brokers and agents are middlemen in the sale of pepper to grinders or packers, and the grinders and packers process the whole pepper into ground pepper, pack it in suitable containers and sell it to the various consumers of ground pepper including meat packers and other food processors.

* * * * * * *

[fol. 210] 5. The various governmental orders have required inventory reports at periodic intervals. On July 1, 1943, these reports disclosed a total supply of pepper in the United States of 47,660,000 pounds of which 29,665,000 pounds was in the hands of dealers and other holders of black pepper and 17,995,000 pounds was in the hands of packers and grinders. On January 1, 1944, there was a total stock of 41,909,000 pounds of which 28,211,000 pounds was in the hands of other holders and 13,698,000 was in the hands of

packers and grinders.* Beginning in the Spring of 1943, pepper ceased to move into normal trade channels out of the hands of certain holders of pepper for investment. Because of its relative indestructibility and wide price fluctuations in normal times, pepper has often been purchased by commodity speculators and other persons interested in making a profit in dealing in the commodity but not in processing it for sale to consumers. Those persons ceased to sell pepper beginning in 1943. It is believed that this refusal to sell was caused by action of the Office of Price Administration in fixing the base price of whole black pepper at 6½ cents per pound ex dock New York, N. Y., a price considered by investors as too low.

* * * * * * *

[fol. 211] 6. In July 1943, the War Food Administration was required to supply the Government of the Union Socialist Soviet Republic with 250 tons of whole black pepper under the Lend-Lease Act. The War Food Administrator received no response to invitations to bid. After considerable time and effort, and largely as a result of affiant's personal appeals to the various holders, this quantity was purchased from eight holders including three foreign owned lots. All of these sellers indicated that the sale was made unwillingly and under protest and that the War Food Administration could not expect to secure other stocks of pepper from them at the ceiling prices as they then and now are fixed.

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* Of the 26,211,000 pounds in the hands of dealers and other holders on January 1, 1944, approximately 16,000,000 pounds were held by Commodities Trading Corp.

[fol. 212] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

AFFIDAVIT OF RALPH W. OLMSTEAD, BEING A PART OF JOINT EXHIBIT "K", PARAGRAPH 15 OF STIPULATION OF FACTS

Civil Action No. 23573

COMMODITIES TRADING CORPORATION, a Delaware Corporation, 80 Broad Street, New York City, New York, Plaintiff,

against

FEDERAL SURPLUS COMMODITIES CORPORATION; CLAUDE R. WICKARD, Individually and as Secretary of Agriculture; Marvin Jones, Individually and as War Food Administrator; Lee Marshall, Individually and as Director of Supply, Office of Distribution, War Food Administration, Ralph W. Olmstead, Individually and as Deputy Director of Supply, Office of Distribution, War Food Administration; Fletcher H. Long, Individually and as Chief of Spice Section of Special Commodities Branch of War Food Administration; H. C. Albin, Individually and as Chief of Special Commodities Branch of War Food Administration; and Irving Trust Company, Defendants

AFFIDAVIT

DISTRICT OF COLUMBIA,
City of Washington, ss.

Ralph W. Olmstead, being first duly sworn, deposes and says that he is and at all times has been since December 1942 the Deputy Director of the Office of Distribution (formerly known as the Food Distribution Administration) of [fol. 213] the War Food Administration in the United States Department of Agriculture; that as such Deputy Director his duties include supervising and directing the procurement of all foodstuffs by the Office of Distribution; that he is also chairman of the Inter-Agency Food Procurement Committee set up to coordinate the food procurement activities of all Government agencies including among others the War Department, Navy Department, War Shipping Administration, Foreign Economic Administration and Veterans Administration; that he is familiar with the governmental requirements for foodstuffs, including pepper; that

early in 1944 it became apparent to him that although there were stocks of raw pepper in the United States, this pepper was not moving through channels of distribution; that the pepper requirements of the Armed Forces of the United States were not being met; that the pepper presently needed by civilians in the United States for use both in the household and in connection with the preservation of meat and meat products was not available to the consumers thereof; that, therefore, on February 11, 1944 he approved a proposal by the Office of Distribution to requisition 22,000,000 pounds of whole natural black pepper and 1,000,000 pounds of natural white pepper for the purpose of meeting these requirements essential to the defense of the United States; [fol. 214] that on February 11, 1944 the proposal signed by him was approved by Mr. Lee Marshall, Director of Distribution, acting for the War Food Administrator, and that in so approving, Mr. Lee Marshall made the findings required by the Act of October 16, 1941; that attached hereto are properly certified copies of the proposal approved by this affiant and by Mr. Lee Marshall and that also attached hereto is certified copy of a memorandum addressed to this affiant by the Chief of the Civilian Requirements Branch of the Office of Distribution and the Chief of the Special Commodities Branch of the Office of Distribution, in which this action was recommended; * * *"

[fol. 215] PLAINTIFFS' EXHIBIT NO. 5 FOR IDENTIFICATION

Contract No.: A1PM (FS) 1576.
Contract Date: November 16, 1946.

UNITED STATES DEPARTMENT OF AGRICULTURE
Commodity Credit Corporation
Special Commodities Branch
Washington 25, D. C.

Edward L. Blackman,
120 Broadway,
New York, N. Y.

GENTLEMEN:

The Commodity Credit Corporation has this day allocated to you the quantity of Whole Black Malabar Pepper

shown below, which you may purchase upon the following terms and conditions:

Commodity: Whole Black Malabar Pepper from India.

Quantity and Description: Approximately 4200 net pounds (30 heavy single bags of approximately 143 pounds gross each). Standard tare allowance 2% of gross weight.

Quality: Commodity is sold in store New York Dock Co., Erie Basin, Brooklyn, N. Y. "As Is" without warranty express or implied as to quantity, quality or condition except that the commodity is fit for human consumption.

Price: $0.75 per pound net, in the store present location.

Transfer of Title: Title to the commodity will pass to the purchaser in store present location at the close of business of the fifteenth day following the issuance to the warehouse by CCC of the Notice to Release or at the time purchaser takes actual possession, whichever is earlier. A copy of the notice will be mailed to Purchaser at the same time notice is sent to warehouse. The Notice to Release will be issued as soon as possible after receipt of payment.

Payment: Purchaser will transmit immediately original and four properly executed copies of this contract, together with certified or cashier's check payable to "commodity Credit Corporation" in the amount of $3150.00 representing value of full approximate contracted quantity, to E. P. Connette, 150 Broadway, New York, N. Y.

Telegraphic Acceptance: Purchaser will telegraph acceptance to Mr. E. P. Connette, 150 Broadway, New York, N. Y. before 5:00 P. M. (at the time zone applicable to address [fol. 216] of purchaser) November 18, 1946 in addition to forwarding of the original and four copies required in payment provision hereof. If telegraphic acceptance is not filed as prescribed herein CCC reserves the right to make other disposal of the above quantity.

Adjustment: Final settlement will be made against certified weighmaster's certificate procured at expense of CCC indicating delivered weights. Claims of any nature must be presented by either party within 60 days after date of acceptance. All storage or other charges accruing after passage of title shall be for account of purchaser.

Commodity Credit Corporation, by L. Thornton Davis, Contracting Officer.

The acceptance of this allocation and required telegraphic acceptance will constitute a valid and binding contract with the Commodity Credit Corporation.

Accepted:

Name of Firm: .....
By: .....
Title: .....

[fol. 217] EXTRACTS FROM DEFENDANT'S EXHIBIT No. 5

UNITED STATES OF AMERICA, OFFICE OF PRICE ADMINISTRATION, WASHINGTON, D. C.

In the Matter of the Petition of COMMODITIES TRADING CORPORATION for Adjustment of Price Schedule No. 52 Relating to Pepper

PETITION FOR ADJUSTMENT

1. The petition herein is filed pursuant to Procedural Regulation No. 1 and relates to Price Schedule No. 52, fixing maximum prices for pepper (issued originally on December 11, 1941, amended February 2, 1942, March 10, 1942, March 16, 1942, August 12, 1942 and November 2, 1942).

2. Petitioner's name and address is Commodities Trading Corporation, a corporation of the State of Delaware, having its principal office at No. 80 Broad Street, Borough of Manhattan, City and State of New York.

3. Petitioner's business is, and has been, the buying of pepper and holding the same for investment.

It is not a dealer in pepper in the ordinary sense, but is an investor which began to purchase Black Pepper in 1933 [fol. 218] to *to* hold as an investment, principally because of the reduction of the gold content of the dollar, and the announced intention of the Federal Government in 1933 to force a decrease in the purchasing price of the dollar and a consequent increase in price levels, and because of the fact that due to the lasting quality of pepper, and the definite cycles of low and high prices to which it has been subject for 75 years, it was a practical certainty that any

one buying at the prices paid by petitioner could sell at a profit if he held on sufficiently long, regardless of changes of price due to the reduction of the gold content of the dollar.

Petitioner's purchases were to a large extent hedges against the anticipated decrease in the purchasing power of bonds held by its stockholders.

In furtherance of its above-stated object, this company since 1933 has purchased pepper from time to time and has sold from time to time, but for periods of many months it neither bought nor sold and much of the black pepper which it has on hand today has been held for several years in storage in warehouses in the United States and has been the source of warehouse and other carrying charges. By 1939 it accumulated over 25,000,000 pounds of Lampong Black Pepper and its dealings were largely responsible for the fact that the beginning of the War found this country in the fortunate position of having more than ten times as much pepper in storage than was usual during the years prior to this company's operations.

[fol. 219] 4. Petitioner desires and requests that Price Schedule No. 52, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, be adjusted so as to permit petitioner to charge 10¢ per pound instead of the price of 6.50¢ for its Whole Lampong Black Pepper and its Whole Black Pepper of similar grades.

5. The following are the facts, which, in the opinion of the petitioner, make the proposed adjustment set out in Paragraph 4 hereof appropriate and necessary:

(a) As above stated, petitioner is not a dealer in pepper, but is an investor, and purchased its pepper with the intent of carrying an inventory of upwards of 15,000,000 pounds for a number of years. It has never been identified with the spice or pepper trade, has never joined any associations, has never had any definite customers, has always been regarded by the pepper trade as an anomaly and an outsider, and its inventory has never been regarded in the trade as a part of the general pepper supply of the country. The ceiling price of 6.50¢ per pound is much below the cost of petitioner's investment, but until October last, it made no effort to secure any increase in the ceiling

price, and was not interested therein, as it desired to continue to hold its pepper, and it was only when it was informed that pepper was becoming scarce that it considered that it would part with its pepper in the public interest, if it could do so at a price that would not entail a loss; and this application is made because [fol. 220] it has been represented to petitioner that a very serious situation exists in the spice industry; that any dealers in spices are completely out of pepper and that they are in danger of losing their businesses because purchasers will not buy any of the whole line of spices unless the seller can supply pepper. Thus, petitioner is informed that a monopoly is being built up in favor of a few large dealers who have pepper, at the expense of the many smaller ones who have no pepper.

Petitioner is further informed that the scarcity of pepper has proceeded to such a point that housewives find it difficult to purchase their domestic supplies.

Petitioner has obtained a temporary injunction, restraining members of the War Food Administration from requisitioning its pepper, and has obtained a decision from the United States District Court for the District of Washington, D. C., that it was not the intent of Congress to confer upon the administration the power to requisition plaintiff's pepper for civilian use. Petitioner is informed and believes that in most of — countries of the world where there is no restriction on the price of pepper it is selling for 40¢ a pound and more, and that in England, where there is a ceiling price of approximately 20¢ it is difficult to obtain pepper at that price.

[fol. 221] There seems to be an emergency, and petitioner is willing to go much more than half-way to assist the public authorities in meeting such emergency, and is willing to sell its pepper at 10¢ per pound, which is the approximate actual investment which petitioner now has in the pepper which it now owns and which is less than half of what it considers is the fair and reasonable value thereof, and the amount which it should receive as just compensation in case of requisition.

(b) The proposed adjustment will not affect the cost of living or the price at which pepper is sold to the consumer.

About 60% of the entire consumption of black pepper is home or restaurant consumption, the remaining 40% being consumed by processors in the making of sausages and other meat products. The pepper which is consumed in the home is most of it sold by retailers in small containers holding 1, 1½, or 2 ounces and such average per capita consumption is less than six ounces per year.

The prices at which such retail sales are made vary, but in most cases, including some important chain stores, the price was 5¢ an ounce.

The quantity of pepper in such small containers is so small and its cost so little that fluctuations in the price of pepper have had little or no effect upon the price at which such containers have been sold at retail. Thus, during the period of 7 years preceding Pearl Harbor, the wholesale price of Lampong Pepper rose to 13¢ per pound and fell to about 3¢, but there was little change in the price to the public of the small containers.

[fol. 222] The maximum increase in selling price under the proposed adjustment would increase the cost of the pepper in the household package about ¼¢, and as the cost of the container, the cost of grinding, packing, handling, cartage, freight, etc. forms so large a part of the cost of the packer who sells to the retailer the increase of ¼¢ need have no appreciable effect upon the selling price to the public.

With respect to pepper sold at restaurants and hotels, the amount consumed with each meal is so infinitesimal that the entire cost of the pepper included in the meal cannot be found.

With respect to the pepper sold to processors, the amount of pepper used does not exceed 6 ounces per 100 pounds of meat product with which it is used, or approximately 2¢ per hundred pounds, and the margin of profit on such meat products is sufficiently large so that the processor can absorb such infinitesimal increase in cost and not pass the same on to the public.

(c) Petitioner believes that the ceiling price originally fixed for Whole Black Pepper was much too low and was made without knowledge or consideration of many important factors. These matters are contained in the petition of this company for an amendment of Regulation 52, permitting the addition of storage charges to the ceiling price

of 6.50¢ per pound, which said petition was filed on or about October 1st, 1943, and in the application of this company, pursuant to Procedural Regulation No. 6, for permission to accept the offer of the United States Army to purchase 1,000,000 pounds of Whole Black Pepper at 9¾¢ per pound, made in November, 1943, and will not be repeated here. In this application, petitioner wishes to show that so far as the [fol. 223] supply of Whole Black Pepper is concerned, its holdings are upwards of three-fourths of those now held by all importers and bulk dealers and that it is fair and reasonable that an adjustment should be made in keeping with the costs of this company, as it is practically the sole source of supply. Petitioner's costs were developed in detail in connection with various applications of this company to the Office of Price Administration in the Fall and Winter of 1943. This company has made no sales since those figures were developed and the only change in its investment is that it has incurred storage and carrying charges for additional months. The investment of this company on May 31st, 1943 in the pepper which it then had on hand is shown in detail in the attached schedule, marked Exhibit "1". This shows a total stock of 17,249,018 pounds of Whole Black Pepper of Lampong or equal grade, at a total purchase price, exclusive of carrying charges, of $1,150,501.39, which is slightly more than 6¢ per pound.

The pepper now on hand has the same average purchase price, exclusive of the carrying charge.

However, petitioner has carried the identical pepper above referred to in warehouses in the United States for an average of approximately 8 years at an approximate cost for storage and other carrying charges of ½¢ per pound per year, so that petitioner's total investment in its said pepper is approximately 10¢ per pound.

Petitioner now has on hand upwards of 15,000,000 pounds of said Whole Black Pepper. The reduction from the figures above stated are due to requisitions by the United States [fol. 224] Army and the United States Navy. These requisitions, however, do not change the above investment figures as the lots requisitioned had the average purchase price above stated and had been on storage for the average number of months above stated.

Wherefore, Petitioner respectfully requests that said Regulation No. 53 or the application thereof to Petitioner,

be adjusted so that the maximum price for pepper stated in subdivision (b) thereof shall read:

	"Cents per pound ex dock New York City
"Lampong Black Pepper	$10.00"

Dated, New York, August 16, 1944.
Commodities Trading Corporation by (Sgd.) William T. Hunter, President.

[fol. 225] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 156

ORDER ALLOWING CERTIORARI—Filed October 24, 1949

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

[fol. 226] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 163

ORDER ALLOWING CERTIORARI—Filed October 24, 1949

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

[fol. 227] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 156

No. 163

[Titles omitted]

STIPULATION AS TO PRINTING RECORD—Filed November 10, 1949

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that, for the purpose of the hearing on the merits, the printed record may, in addition to the record printed for the purposes of the petitions for writs of certiorari, consist of the following:

1. Defendant's Designation of Additional Parts of the Record, consisting of excerpts from the testimony of Murray Squires and Defendant's Exhibit No. 3.

2. The following excerpts from Plaintiffs' Designation of Additional Portions of the Record:

a. Testimony of Isidor B. Katz.

i. From the beginning of p. 1 of the Transcript through A to Q. 2.

ii. Answer to Q. 6.

[fol. 228] iii. Answer to Q. 7.

iv. Q. 12 through and including A to Q. 22.

v. Q. 33 through and including A to Q. 34.

vi. Q. 36 through and including A to Q. 39.

vii. Q. 60 through and including A to Q. 66.

viii. Q. 76 and answer.

ix. Q. 81 through and including A to Q. 83.

x. Q. 88 through and including A to Q. 162.

xi. Q. 165 through and including A to Q. 178.

xii. Q. 181 through and including A to Q. 193.
xiii. Q. 196 through and including A to Q. 199.
xiv. Q. 201 through and including A to Q. 208.
xv. Q. 211 through and including A to Q. 212.

b. Testimony of William T. Hunter.

i. From the beginning through and including A to Q. 10.
ii. Q. 13 through and including A to Q. 19.
iii. Q. 34 through and including A to Q. 37.
iv. X Q. 93 through and including A to X Q. 105.

c. Continuation of examination of Mr. Katz.

i. Q. 215 through and including A to Q. 227.
ii. Commissioner's Q following Q. 233 through and including "I respectfully except" on p. 126.
iii. X Q. 234 through and including A to X Q. 287.
iv. X Q. 298 through and including A to X Q. 305.
v. X Q. 309 through and including answer to X Q. 310.
vi. Colloquy between Commissioner and Witness following X Q. 331 through and including answer to X Q. 338.
vii. X Q. 341 through and including A to X Q. 423.
viii. R D Q. 429 through and including answer to R D Q. 431.
ix. R D Q. 439 through and including answer to R D Q. 442.
x. R D Q. 451 through and including A to R D Q. 499.
xi. R D Q. 502 through and including A to R D Q. 503.

[fol. 229] d. Testimony of William Archibald.

i. From the beginning through answer to Q. 15.
ii. Last lines on p. 87 beginning "I was Secretary" through to the end of that paragraph.
iii. Q. 19 through and including A to Q. 24.
iv. Q. 29 through and including A to R D Q. 122.
v. Q. 32 through and including A to R D Q. 96.
vi. R D Q. 100 and answer.

e. Testimony of Mrs. Corbitt.

i. From beginning through A to Q. 33.
ii. Q. 26 through and including answer to Q. 42.
iii. Q. 45 to the end of Mrs. Corbitt's testimony.

f. Testimony of Mr. Greisheimer.

i. From beginning to A to Q. 30.
ii. From Q. 42 through and including A to Q. 50.

iii. From Q. 73 through and including A to Q. 95.
iv. From 108 through and including A to Q. 155.

g. Testimony of Murray Squires.

i. Q. 31 through and including A to Q. 32.
ii. Q. 92 through and including Q. 105.
iii. Q. 140 through and including A to Q. 141.
iv. Q. 145 through and including A to Q. 158.
v. Q. 180 through and including A to Q. 194.
vi. Q. 201 through and including A to Q. 217.
vii. Q. 249 through and including A to Q. 255.
viii. Q. 257 through and including A to Q. 266.
ix. Q. 272 through and including A to Q. 274.

h. Testimony of Mr. Konvalinka.

i. From beginning to A to Q. 22.
ii. Q. 24 through to the A to Q. 27.

i. All of pages 181 through and including p. 186.

j. P. 187 commencing "now pursuant to our stipulation" to and including "to which we have referred."

k. P. 188 commencing with "Commissioner Gyles. I do not want" to and including P. 189 ending with "Mr. Barnes. I admit."

l. P. 190, commencing with "Mr. Blackman, I offer in evidence" to and including all of p. 193.

m. P. 197 beginning "Mr. Barnes I would like now" to and including the end of p. 224.

[fol. 230] 3. This stipulation.

It is further stipulated and agreed that either of the parties hereto may refer in its brief to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Philip B. Perlman, Solicitor General, Counsel for the United States; Edward L. Blackman, Counsel for Commodities Trading Corporation, et al.

[fol. 231] [File endrosement omitted.]

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 156

THE UNITED STATES, PETITIONER

v.

COMMODITIES TRADING CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on April 4, 1949.

OPINION BELOW

The opinion of the Court of Claims (R. 23-30 [1]) is reported at 83 F. Supp. 356.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1949 (R. 30-31). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

[1] The record certified to this Court by the Court of Claims includes a substantial amount of evidence, most of which respondents designated for certification and which, by stipulation of the parties, has been omitted from the printed record accompanying the Government's petition for a writ of certiorari. (R. —) and (Tr. —) will be used herein to refer to the printed record and the unprinted transcript, respectively.

QUESTION PRESENTED

Whether in a suit for just compensation by the owner of whole black pepper, requisitioned by the United States for war uses, the proper measure of just compensation was the lawful O. P. A. ceiling price which when established approximated free market value and thereafter formed the basis for substantial trading, or a so-called retention value which took into account, among other items, scarcity value caused by wartime shortages and a speculative value based upon the expectation of an ultimate removal of wartime price restrictions.

STATUTE INVOLVED

The pertinent portions of the Requisitioning Act as it read at the time of the requisition in question (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, 1943, c. 181, 57 Stat. 271) [2] provided as follows:

> Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equip-

[2] The statute was thereafter amended, in respects of no significance to this case, by the Act of June 28, 1944, c. 307, 58 Stat. 624 and the Act of June 30, 1945, c. 208, 59 Stat. 271. See 50 U.S.C. App., 1940 ed. Supp. V, 721. The Act has expired by its own terms. See note under "Codification", 50 U. S. C. App., 721 (1946 ed.).

ment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U.S.C., 1934 ed., title 28, secs. 41 (20) and 250) for an

additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

STATEMENT

Respondent, Commodities Trading Corporation (Commodities), has brought this suit to recover just compensation for the requisition by the War Department, in May 1944, of some 760,000 pounds of whole black pepper. The pertinent facts are these:

Whole black pepper is grown in Sumatra, French Indo-China and India, the Lampong type here involved being grown only in Sumatra (R. 15). It is not perishable and will last unimpaired in quality for several decades (R. 22). In March, 1942, when this country was cut off from these producing areas (except India) by Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds (about three years supply) of whole black pepper in the hands of importers in the United States (R. 15). Of this stock pile, approximately 17,000,000 was owned by Commodities and had been accumulated by it since its incorporation in 1933 (R. 14, 15). On December 7, 1941, Commodities had had approximately 21,000,000 pounds, but 4,000,000 pounds had been sold for future delivery and was delivered in the early months of 1942 (R. 14).

During the years 1936 to 1940, both inclusive, the average annual price of whole black pepper, computed from daily spot prices, had been: 1936,

5.5 cents per pound; 1937, 6.1 cents; 1938, 5.4 cents; 1939, 4.0 cents; 1940, 4.1 cents (R. 15). During the year 1941, through the month of November, the average daily prices had been: January, 4.1 cents per pound; February, 4.5 cents; March, 6.2 cents; April, 6.3 cents; May, 6.9 cents; June, 5.8 cents; July, 5.9 cents; August, 6.1 cents; September, 6.0 cents; October, 5.8 cents; November, 5.8 cents (R. 15). During the first week of December 1941, the average daily price was 5.78 cents per pound (R. 15). The average price over the 50-year period preceding the war was 13½ cents a pound (R. 16).

On December 11, 1941, the Office of Price Administration issued Price Schedule No. 52, establishing a ceiling price of 6.75 cents a pound on the whole black pepper ex dock or warehouse, New York City (R. 15).[3] This price, the court below has found, was at least the fair market price as of that date (R. 16). On February 3, 1942, the Office of Price Administration amended and reissued this

---

[3] The preamble reads as follows (6 Fed. Reg. 6375):

> Pepper is one of the imported commodities which has experienced during the past few months several sharp inflationary price movements. This was followed by a period of relative price stability. With the outbreak of war, the dangers of speculation and inflationary price rises have been magnified, mainly because of the fear of shipping shortages and eventual depletion of stocks. To prevent such unwarranted movements and to hold the stability achieved by the trade, the Office of Price Administration hereby freezes all pepper prices at those which prevailed at New York City on December 8, 1941.
>
> It is contemplated that, after completion of the studies now being made, a revised price schedule will be issued. If the studies so justify, prices lower than the maximum prices herein will be ordered.

price schedule as Revised Price Schedule No. 52, setting the ceiling price at 6.50 cents per pound (R. 17). To this were added labor charges paid the warehouse for putting the pepper in storage and taking it out, and warehouse storage charges for not more than 30 days, which, on the average, raised the ceiling price for pepper which had been stored in warehouses for 30 days or more to about 6.63 cents a pound (R. 17).[4]

Between December 11, 1941 and February 3, 1942, actual prices did not reach the 6.75 cents price ceiling (R. 16). During January, 1942, the highest daily price was 6.45 cents a pound, with the average for the month being 6.41 cents (R. 16). These sales were made by certain traders, importers and grinders, particularly those who held smaller lots, because they realized that it would be impossible for them to obtain a greater price than the ceiling and they therefore sold rather than hold the pepper indefinitely and incur the cost of holding (R. 16).

Despite the progressively stricter restrictions in 1942 and 1943, imposed for conservation purposes by the War Production Board and later by the Director of Food Distribution, on the deliveries of peppers by packers and receipts by wholesalers and industrial users (R. 17-18), the traders and importers rapidly disposed of their stocks to wholesalers and grinders (R. 18). There was progres-

[4] The Revised Price Schedule No. 52 also provided that the maximum price for pepper sold for export might exceed the domestic price by no more than ten per cent (R. 17).

sively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings and replenishment of their stocks had become impractical because of war conditions (R. 18). By September 30, 1943, the inventory in the hands of importers had been reduced to about 28,000,000 pounds, of which Commodities continued to retain its original 17,000,000 pounds holding (R. 18; *supra*, p. 4). Between September 30, 1943 and the date of requisition (May 26, 1944), very little whole black pepper was sold out of these inventories (R. 18), and Commodities itself apparently refused to sell any substantial amounts either to the Government or to private purchasers.

On October 4, 1943, Commodities, in the first formal protest against ceiling prices for pepper (R. 19, Tr. 2), filed a petition seeking amendment of Revised Price Schedule No. 52 and requesting the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of 1/24 cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date of this amendment shall have been owned and stored by him" (R. 20). The Price Administrator by a letter dated March 11, 1944 denied the petition (R. 20; D. Ex. 3). In the letter, it was pointed out that an evaluation of Commodities' inventory on a "first in, first out" basis showed that the average cost of its inventories on February 3, 1942 was 5.156 cents per pound, and

sales of its inventory at that time, at the ceiling price of 6.50 cents plus permissible charges, or 6.63 cents, would have afforded it a gross margin of profit of 20.35 per cent (D. Ex. 3, p. 2).[5] Since "the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942, appears as fair and equitable to you" (D. Ex. 3, p. 2). The letter further noted (D. Ex. 3, p. 2):

> Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to purchase since the issuance of the regulations. Under all these circumstances, it has been determined that it would be unfair to give you the increase in maximum prices which you request.

Commodities did not appeal from this denial to the Emergency Court of Appeals (Tr. 3).

On May 29, 1944, the War Department, acting pursuant to the Act of October 16, 1941, as amended, *supra*, pp. 2-4, requisitioned and took possession of 759,750.88 pounds of Lampong whole black pepper, owned by Commodities, subject to the lien of Irving Trust Company (R. 13).[6] Both

[5] Had the inventory been sold on October 4, 1943, the date of Commodities' petition, the Administrator commented, the additional carrying charge of .6232 cents per pound would have reduced the gross margin of profit by 8.13 per cent (D. Ex. 3, p. 2).

[6] The War Department had previously requisitioned approximately one million pounds of pepper from Commodities.

Commodities and Irving Trust Company rejected the offer of the War Department's "initial compensation officer," the determination of the Chief Requisitioning Officer, Offi.. of Quartermaster General, and the award of the Acting Under Secretary of War of $50,266.76 plus interest at 4% as just compensation for this pepper (R. 14-15). This amount was computed on the basis of the 6.63 cents per pound ceiling price in effect on the date of the requisition (R. 14-15). Fifty per cent of the award was thereafter paid to them (R. 15), and on October 3, 1945, this suit for just compensation was filed in the Court of Claims[7] (R. 1-4). In its special findings of fact, the Court of Claims, in addition to the foregoing, made the following findings of fact:

On November 1, 1943, in response to the request of the War Department, Commodities had offered to sell to it one million pounds of pepper at 9¾ cents per pound, subject to obtaining prior approval of the Office of Price Administration (R. 20). No formal action had been taken on Commodities' application for such approval since, while the matter was pending, the pepper was requisitioned by the War Department (R. 20). This requisition is now subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47588. The subsequent requisitions from Commodities of whole black pepper, one by the War Department of about 500,000 pounds in April 1945 and the other by the Navy Department of about 300,000 pounds in June 1944, are also subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47587.

[7] Approximately three months after the institution of this action, Commodities was dissolved by the voluntary action of its stockholders (R. 8, 12). Pursuant to the plan of dissolution, the company's assets, including its claim in this proceeding, were distributed in kind to the stockholders, in proportion to their holdings (R. 8, 12). The stockholders, upon being permitted to intervene in the Court of Claims as parties plaintiffs in this proceeding, have adopted the petition therein filed and the proceedings had (R. 9, 13).

The pepper requisitioned by the Government is identified by lot numbers from purchases by Commodities from October 1933 to January 1936, amounting to 5805 bags, or 773,201 pounds net, at an invoice cost of $53,143.13, an average of 6.21046 cents per pound (R. 21). By the time it was requisitioned, it had been carried by Commodities for periods averaging 9 years and 4½ months, and its total cost to Commodities including carrying charges, allowance for shrinkage and for general administrative expense, but excluding officer's salaries, supervision and purchasing expenses, resulted in an average cost to Commodities of 12.7 cents per pound (R. 21-22). This cost included substantial charges for storage, insurance, taxes, and financing incurred during the period after establishment of the ceiling price during which respondent refused to make sales (R. 22); the average cost as of February 1942 was much lower. *Supra*, pp. 7-8.

In October 1944, the Office of Price Administration, after obtaining an informal agreement from Commodities to sell about 7,000,000 pounds at a higher price, increased the ceiling price to 10 cents per pound (R. 19). Commodities did sell approximately 7,000,000 pounds at that price (R. 19). In June 1945, Commodities sold approximately 124,000 pounds of pepper to consignees in Puerto Rico at various prices averaging 14.19 cents per pound (R. 19); the then Price Schedule permitted an exportee to add to the 10 cents domestic ceiling, his usual pre-war export mark-up plus 25% thereof

(R. 19). In March 1946, again following negotiations between Commodities and the Government, the ceiling price was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of about 3,000,000 pounds at that price (R. 19). After the removal of price ceilings in August 1946, pepper was actively sold at 50 to 60 cents per pound and upward, and at 40 cents a pound and upward for future delivery in 3 or 4 months (R. 18).

Because of the nature of the pepper vine and the conditions under which it is grown in Sumatra, there is about a 5-year time lag before prices can affect the crop (R. 22). The reduction in crops in 1937, 1938, 1939 had had, by 1941, sufficient effect in raising prices so that new plantings might have been made by 1942 (R. 22). "If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946 when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States." (R. 22-23).

In determining just compensation, the Court of Claims refused to be governed by the concurring opinion of Mr. Justice Reed in *United States v. Felin & Co.*, 334 U. S. 624, 642, and rejected the applicable maximum price as the measure of just compensation since the property requisitioned was non-perishable (R. 24-25). "This is so because the owner of nonperishable property

has the right to hold it until after restrictions are removed and then to sell it" (R. 25). It held that because of the owner's right to retain the property, just compensation must be fixed on the basis of "retention value," which it considered particularly applicable here, since Commodities, being an "investor" rather than a trader in pepper, "had accumulated its stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it" (R. 25). In arriving at retention value, the court considered the "very great rise in price [which] was inevitable upon the removal of restrictions" (R. 26), and the rise in price, which but for the war, would probably have resulted due to curtailment of planting. (R. 26). It further considered the cost of the pepper to Commodities and the sales subsequent to the requisition at the increased ceiling prices and concluded that the fair value of the pepper on May 26, 1944, the date on which it was requisitioned, was $113,962.63, or 15 cents a pound (R. 27). Judge Madden dissented on the ground that the ceiling price was the proper measure of just compensation (R. 28-30). Chief Judge Jones did not participate (R. 30).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In failing to hold that the maximum price in effect at the time the pepper was requisitioned,

validly established by the Office of Price Administration, was the proper standard of just compensation therefor.

(2) In holding that the determination of just compensation in time of war or national emergency must take into account "the plaintiff's right to hold its property until restrictions on its disposition are removed" and "his right to hold his property until he can get for it whatever any one is willing to pay."

(3) In fixing as just compensation for the pepper requisitioned an amount in excess of the maximum price therefor at the time of the requisition, as fixed by the regulations of the Office of Price Administration.

(4) In entering judgment for respondents in the amount for which it was entered.

REASONS FOR GRANTING THE WRIT

In this case, the War Department requisitioned a part of Commodities' stock pile of whole black pepper, an imported commodity, which had become very scarce because the Japanese had overrun the principal sources of supply. During this period of increasing shortage (1942-1944), Commodities, which had been created in 1933 to speculate in pepper, refused to sell while other importers disposed of their stocks. As a result, at the time of requisition it owned more than 60% of the total domestic stock pile, and the Army was forced, in

order to procure the necessary supplies, to invoke its powers of condemnation. The Government offered to pay Commodities as just compensation the maximum price established by the Office of Price Administration. This price, when established early in 1942, reflected the fair market price and was the price at which 80 to 90% of the domestic pepper, other than that owned by Commodities, was thereafter bought and sold.

The refusal of the court below to limit Commodities' recovery to this ceiling price squarely presents the question whether a maximum price, validly established in time of war, and forming the basis for substantial trading, may be taken as the measure of just compensation for property requisitioned by the Government to meet its wartime needs. In *United States* v. *Felin & Co.*, 334 U. S. 624, three justices (joined in part by Mr. Justice Rutledge) concurring in the Court's judgment were of the opinion that the maximum price there involved measured just compensation. 334 U. S. at 642. Three other justices, with whom Mr. Justice Rutledge also joined in part, while they recognized that "the implications * * * reach far" (334 U. S. at 625), considered it unnecessary to pass on that question (334 U. S. at 630). Despite the termination of the wartime procurement program, this problem has importance, both present and potential. Similar questions are involved in a substantial number of actions pending against the United States for property requisitioned for war-

time uses. In addition, determination of the impact in wartime of valid maximum prices on just compensation will have an important bearing on the methods of mobilizing civilian property for the defense of the country which may be adopted in the event of future national emergencies. Cf. *Lichter* v. *United States*, 334 U. S. 742, 766-768.

1. (a) The Court of Claims erred in rejecting, as unfair to respondent, an award based on the established lawful O.P.A. maximum price for the pepper involved here. In the circumstances of this case, payment measured by that ceiling price was just and equitable to respondent and the Government, as well as to the public, and the Fifth Amendment prescribes no more exacting or precise test of compensation. *United States* v. *Felin & Co.*, 334 U. S. 624, 642 (opinion of Mr. Justice Reed); see, also, *Vogelstein and Co.* v. *United States*, 262 U. S. 337; *Cudahy Bros. Co.* v. *United States*, 155 F. 2d 905 (C. A. 7); *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. A. 2); *Graves* v. *United States*, 62 F. Supp. 231 (W. D. N. Y.); *Lessner Plumbing and Heating Co.* v. *United States*, 64 F. Supp. 931 (S. D. N. Y.); *Louisville Flying Service, Inc.* v. *United States*, 64 F. Supp. 938 (W. D. Ky.). Although, as the court below pointed out (R. 25), the property involved in the *Felin* case was perishable, the rationale of that opinion applies equally where, as here, the property involved is not perishable. In either situation, it would be anomalous to hold that, while the Government may in the exercise of the war

powers, impose maximum prices at which property is sold to the general public, it must pay a higher price as just compensation when it exercises these war powers to requisition property for use in the defense of the nation from aggression. See R. 30 (Judge Madden dissenting); cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 645; *Lichter* v. *United States*, 334 U. S. 742, 755-766; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305. Such a distinction would not only place a premium on non-cooperation with the Government's war procurement program (cf. *United States* v. *Delano Park Homes*, 146 F. 2d 473, 474 (C. A. 2)), but would in large measure nullify the anti-inflation objectives of the price control legislation.* During

* Section 1(a) of the Emergency Price Control Act of 1942 (56 Stat. 23, as amended, 50 U. S. C. App. 901) provides that the objectives of the Act were

> "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; *to assure that defense appropriations are not dissipated by excessive prices;* to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; *to prevent hardships* to persons engaged in business, to schools, universities, and other institutions, and *to the Federal, State, and local governments, which would result from abnormal increases in prices;* to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *" (Italics supplied.)

a period of war, Government buying dominates the market, and hence the legally established maximum prices would cease to have much meaning if the Government were put in the position of procuring needed property by requisition, rather than by voluntary cooperation, and were required to pay more than these maximum prices. Those fortunately possessed, like respondent, of a large share of a required commodity would be impelled by their own pecuniary interests to avoid and destroy the ceiling price-structure by insisting on condemnation. See Note, *Legal and Economic Aspects of Wartime Price Control*, 51 Yale L. J. 819, 840-841; Marcus, *The Taking and the Destruction of Property Under a Defense and War Program*, 27 Cornell L. Q. 476, 528-530.

(b) The use of these legally established prices as the measure of just compensation in a period of war is fully warranted, even though the market during that period is not completely free and open, but is controlled as to upward movement of selling price. Although so controlled, these prices fully meet the standards of fairness and substantial justice to the owner which this Court has frequently held are the only basic measures of the compensation prescribed by the Constitution. *United States* v. *Cors*, 337 U. S. 325, 332; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377-378; *United States, ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 279, 280; *United States* v. *Miller*, 317 U. S. 369, 375. Just as the value on an uncontrolled market

is not always synonymous with just compensation, but rather is used only when it reflects a *fair* market value, which the owner should receive, so too do properly established ceiling prices reflect a fair market value, at least where active and substantial trading has taken place thereunder. Note, 60 Harv. L. Rev. 132, 136. Under the Emergency Price Control Act (56 Stat. 23, as amended, 50 U. S. C. App. 901 *et seq.*) the prices set by the Price Administrator were to be those which, "in his judgment will be generally fair and equitable" Section 2(a), 50 U. S. C. App. 902(a).[9] They were to be set with "due consideration" to the prices in a normal market, *i. e.*, "the prices prevailing between October 1 and October 15, 1941 (or if * * * the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative)."[10] Moreover, provision was usu-

[9] No question as to a legislative determination of just compensation need be here involved; Section 204(a) (50 U. S. C. App. 924(a)) provides for judicial review by the Emergency Court of Appeals of the price ceilings so established. Cf. *United States* v. *Jones*, 336 U. S. 641.

[10] Section 2(a) goes on to require the Administrator to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

ally made for special relief to individual vendors who could show that a general price regulation had an unfair incidence in their particular case. Thus, the maximum prices established by the Office of Price Administration, and not overthrown by the Emergency Court of Appeals, must normally be taken to be fair and equitable, with a free market price used whenever representative. In these circumstances, their use during wartime as the measure of just compensation—which itself requires no more than fairness, equity, and substantial justice—will necessarily bear the stamp of fairness (except in the unusual instance) to the owner, to other traders, the public and the Government. Cf. *Walker* v. *United States*, 105 C. Cls. 553, 580; Note, 60 Harv. L. Rev. 132, 133-134. Denial of any excess over the fair and equitable ceiling price can therefore constitute no injustice to the owner of the requisitioned goods. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 280; *Nortz* v. *United States*, 294 U. S. 317, 329-330; see, also, *e. g. Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

(c) The course of events in this case demonstrates the propriety of using the established maximum price for whole black pepper as the full measure of respondent's compensation. The cessation in active trading in the commodity by May 26, 1944, when the pepper was requisitioned, resulted both from a scarcity of pepper and the concentration of the available supply in the hands of

few persons, principally Commodities, which, as a speculator owning more than 60 per cent of the total stock pile, was holding it for the high prices it was expected to command upon the termination of controls. In contrast to this anticipated speculative profit, predicated on the scarcity of pepper, which, we submit, was not a proper element of just compensation (cf. *United States* v. *Cors, supra,* at 341, fn. 3 (Mr. Justice Frankfurter dissenting)), it is clear that the O. P. A. ceiling price approximated a fair market price for whole black pepper (cf. R. 16). The average annual price during the approximately six years prior to the imposition of any price ceiling was well below the ceiling (see R. 15, *supra,* pp. 4-5). Active trading continued at or below maximum price after its establishment while the stock pile, which, at the outbreak of hostilities amounted to between 78 and 100 million pounds, was still widely held. Many millions of pounds of pepper were sold by private owners to private buyers at this price. Active trading diminished and finally ceased only after importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impractical because of war conditions (R. 18).

In addition, the maximum price was not protested as unfair, either when it was first established or thereafter on the basis of changed circumstances.[11] In its petition filed with the Price Ad-

[11] It is nowhere suggested that the ceiling price was set with a view to establishing the price for Government requisitioning, rather than to the needs of private trading. Cf. 334 U. S. at 646; R. 29.

ministrator on October 4, 1943, almost two years after the establishment of this ceiling price, Commodities sought only permission to include additional storage costs in the price (R. 20); the Price Administrator denied the request because he found that the price allowed Commodities a profit substantially in excess of the normal profit in the trade, and he also specifically determined that the general price ceiling should, in all fairness, be applied to respondent. *Supra*, pp. 7-8. Commodities did not appeal to the Emergency Court of Appeals from this denial. *Supra*, p. 8. Cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 646. Clearly, therefore, the O. P. A. maximum price stands uncontested as both generally fair and equitable, and also fair and equitable in its individual application to respondent—properly the entire measure of just compensation to which Commodities is entitled (cf. R. 29-30, Judge Madden dissenting).

2. The court below compounded its error by determining just compensation on the basis of "retention value," which it stated involved "taking into consideration [the owner's] right to hold his property until he can get for it whatever anyone is willing to pay" (R. 25), "the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed" (R. 27), as well as transactions which occurred after the requisition (R. 27). A determination of just compensation on the basis of these considerations violates the fundamental principle

that just compensation is to be determined at the time of taking (*Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246), and partially nullifies the dominant purpose of the requisitioning power to enable the Government to obtain needed goods, at reasonable prices, from a recalcitrant owner who would prefer to await the much higher sums which he anticipates, because of wartime conditions, private parties will be willing to pay in the future. Cf. I Bonbright, *The Valuation of Property* (1937) 408; cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309. For wartime takings, the Fifth Amendment's just compensation clause does not require the owner to be compensated for expected post-war profits.

Moreover, the decision below erroneously compensates Commodities for the pepper's special value to it for speculative purposes due to its scarcity (*United States* v. *Cors*, *supra*, at 341, fn. 3 (Mr. Justice Frankfurter dissenting); *Olson* v. *United States*, 292 U. S. 246, 257; cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377), and for its economic power as a monopolist of whole black pepper. The subsequent sales—some taking place after October 1945, when this suit was brought (*supra*, p. 9)—which the court below took into consideration were made at the increased O. P. A. ceiling prices which Commodi-

ties had exacted as a condition for its making available to the public a part of its stock pile.[12] Such value does not represent "what 'a willing buyer would pay in cash to a willing seller,' *United States v. Miller* [317 U. S. 369], 374, in a fair market" (*United States* v. *Cors, supra*, 337 U. S. at 333), but represents what can be exacted from the public for a commodity, the supply of which, because we were cut off from foreign sources, had become increasingly scarce. As stated in the *Cors* case (337 U. S. at 334), that is "a hold-up value, not a fair market value" and, hence, far from being the proper measure of just compensation as the court below held, should not have even been considered as an element in its determination.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1949.

[12] The court below failed to accord any weight to Commodities' offer of November 1943 to sell to the War Department a million pounds of pepper at 9½ cents a pound (R. 20; *supra*, fn. 6, p. 9.)

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Nos. 156 and 163

In the Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES, PETITIONER

v.

COMMODITIES TRADING CORPORATION, ET AL.

COMMODITIES TRADING CORPORATION, ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 156

THE UNITED STATES, PETITIONER

v.

COMMODITIES TRADING CORPORATION, ET AL.

No. 163

COMMODITIES TRADING CORPORATION, ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims is reported at 113 C. Cls. 244.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1949. The petition for a writ of certiorari in No. 156 was filed on July 1, 1949,

and the cross-petition for writ of certiorari in No. 163 was filed on July 5, 1949. Certiorari was granted in both cases on October 24, 1949 (R. 138–139). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether in a suit for just compensation by the owner of whole black pepper, requisitioned by the United States for war uses, the proper measure of just compensation was the lawful O. P. A. ceiling price which, at the time it was established, approximated free market value and thereafter formed the basis for substantial trading—or a so-called "retention value" which took into account, among other items, scarcity "value" caused by wartime shortages and a speculative "value" based upon the expectation of ultimate removal of wartime price restrictions.

2. Whether the Court of Claims erred in failing to award petitioners 22 cents per pound for the whole black pepper requisitioned from them.

STATUTES INVOLVED

The pertinent portions of the Requisitioning Act as it read at the time of the requisition in question (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, 1943, c. 181, 57 Stat. 271) are set forth in Appendix A, *infra*, pp. 117–118. Appendix B contains relevant

excerpts from the Emergency Price Control Act of 1942 (Act of January 30, 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. 901). *Infra*, pp. 119–124.

The Office of Price Administration's Revised Price Schedule No. 52—Pepper, as it provided at the time of the requisition involved here (May 26, 1944) is set forth in Appendix C, *infra*, pp. 125–131.

STATEMENT

Commodities Trading Corporation (Commodities), has brought this suit to recover just compensation for the requisition by the War Department, in May 1944, of some 760,000 pounds of whole black pepper. The pertinent facts are these:

1. Whole black pepper is grown in Sumatra, French Indo-China and India, the Lampong type here involved being grown only in Sumatra (R. 15). It is not perishable and will last unimpaired in quality for several decades (R. 22). In March 1942, when this country was cut off from these producing areas (except India) by Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds (about three years' supply) of whole black pepper in the hands of importers in the United States (R. 15). Of this stockpile, approximately 17,000,000 was owned by Commodities and had been accumulated by it since its incorporation in 1933 (R. 14, 15). On December 7, 1941, Commodities had had ap-

proximately 21,000,000 pounds, but 4,000,000 pounds had been sold for future delivery and was delivered in the early months of 1942 (R. 14).

During the years 1936 to 1940, both inclusive, the average annual price of whole black pepper, computed from daily spot prices, had been: 1936, 5.5 cents per pound; 1937, 6.1 cents; 1938, 5.4 cents; 1939, 4.0 cents; 1940, 4.1 cents (R. 15). During the year 1941, through the month of November, the average daily prices had been: January, 4.1 cents per pound; February, 4.5 cents; March, 6.2 cents; April, 6.3 cents; May, 6.9 cents; June, 5.8 cents; July, 5.9 cents; August, 6.1 cents; September, 6.0 cents; October, 5.8 cents; November, 5.8 cents (R. 15). During the first week of December 1941, the average daily price was 5.78 cents per pound (R. 15). The average price over the 50-year period preceding the war was 13½ cents a pound (R. 16).

On December 11, 1941, the Office of Price Administration issued Price Schedule No. 52, establishing a ceiling price of 6.75 cents a pound on whole black pepper ex dock or warehouse, New York City (R. 15).[1] This price, the court

[1] The preamble reads as follows (6 Fed. Reg. 6375):

"Pepper is one of the imported commodities which has experienced during the past few months several sharp inflationary price movements. This was followed by a period of relative price stability. With the outbreak of war, the dangers of speculation and inflationary price rises have been magnified, mainly because of the fear of shipping shortages and eventual depletion of stocks. To prevent such unwar-

below has found, was at least the fair market price as of that date (R. 16). On February 3, 1942, the Office of Price Administration amended and reissued this price schedule as Revised Price Schedule No. 52, setting the ceiling price at 6.50 cents per pound (R. 17). To this were added labor charges paid the warehouse for putting the pepper in storage and taking it out, and warehouse storage charges for not more than 30 days, which, on the average, raised the ceiling price for pepper which had been stored in warehouses for 30 days or more to about 6.63 cents a pound (R. 17).[2]

Between December 11, 1941, and February 3, 1942, actual prices did not reach the 6.75 cents price ceiling (R. 16). During January 1942, the highest daily price was 6.45 cents a pound, with the average for the month being 6.41 cents (R. 16). These sales were made by certain traders, importers and grinders, particularly those who held smaller lots, because they realized that it would be impossible for them to obtain a greater

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ranted movements and to hold the stability achieved by the trade, the Office of Price Administration hereby freezes all pepper prices at those which prevailed at New York City on December 8, 1941.

"It is contemplated that, after completion of the studies now being made, a revised price schedule will be issued. If the studies so justify, prices lower than the maximum prices herein will be ordered."

[2] The Revised Price Schedule No. 52 also provided that the maximum price for pepper sold for export might exceed the domestic price by no more than ten percent (R. 17). Appendix C, *infra*, p. 126.

price than the ceiling and they therefore sold rather than hold the pepper indefinitely and incur the cost of holding (R. 16).

Despite the progressively stricter restrictions in 1942 and 1943, imposed for conservation purposes by the War Production Board and later by the Director of Food Distribution, on the deliveries of peppers by packers and receipts by wholesalers and industrial users (R. 17–18), the traders and importers rapidly disposed of their stocks to wholesalers and grinders (R. 16–17, 18). There was progressively less activity from approximately the middle of 1942, as importers, other than Commodities, disposed of their holdings and replenishment of their stocks had become impractical because of war conditions (R. 18). By September 30, 1943, the inventory in the hands of importers had been reduced to about 28,000,000 pounds, of which Commodities continued to retain its original 17,000,000 pounds holding (R. 18; *supra*, pp. 3–4). Between September 30, 1943, and the date of requisition (May 26, 1944), very little whole black pepper was sold out of these inventories (R. 18), and Commodities itself apparently refused to sell any substantial amounts either to the Government or to private purchasers (R. 14, 18, 20).

On October 4, 1943, Commodities, in the first formal protest by anyone against ceiling prices for pepper (R. 35), filed a petition seeking amendment of Revised Price Schedule No. 52 and

requesting the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of 1/24 cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date of this amendment shall have been owned and stored by him" (R. 20). The Price Administrator, in a letter dated March 11, 1944, denied the petition (R. 20). In the letter, it was pointed out that an evaluation of Commodities' inventory on a "first in, first out" basis showed that the average cost of its inventories on February 3, 1942, was 5.156 cents per pound, and sales of its inventory at that time, at the ceiling price of 6.50 cents plus permissible charges, or 6.63 cents, would have afforded it a gross margin of profit of 20.35 per cent (R. 36–37).[3] Since "the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942 appears as fair and equitable to you" (R. 37). The letter further noted (R. 37):

> Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to

[3] Had the inventory been sold on October 4, 1943, the date of Commodities' petition, the Administrator commented, the additional carrying charge of 0.6232 cents per pound would have reduced the gross margin of profit by 8.13 percent (R. 37).

> purchase since the issuance of the regulations. Under all these circumstances, it has been determined that it would be unfair to give you the increase in maximum prices which you request.

Commodities did not appeal from this denial to the Emergency Court of Appeals (R. 35).

On May 29, 1944, the War Department, acting pursuant to the Act of October 16, 1941, as amended, *infra*, pp. 117–118, requisitioned and took possession of 759,750.88 pounds of Lampong whole black pepper, owned by Commodities, subject to the lien of Irving Trust Company (R. 13).[4] Both Commodities and Irving Trust Company rejected the offer of the War Department's "initial compensation officer," the determination of the Chief Requisitioning Officer, Office of Quartermaster

[4] The War Department had previously requisitioned approximately one million pounds of pepper from Commodities. On November 1, 1943, in response to the request of the War Department, Commodities had offered to sell to it one million pounds of pepper at 9¾ cents per pound, subject to obtaining prior approval of the Office of Price Administration (R. 20). No formal action was taken on Commodities' application for such approval since, while the matter was pending, the pepper was requisitioned by the War Department (R. 20). This requisition is now subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47588. The subsequent requisitions from Commodities of whole black pepper, one by the War Department of about 500,000 pounds in April 1945 and the other by the Navy Department of about 300,000 pounds in June 1944, are also subject to litigation in the Court of Claims. *Commodities Trading Corporation* v. *United States*, C. Cls. No. 47587.

General, and the award of the Acting Under Secretary of War of $50,266.76 plus interest at 4% as just compensation for this pepper (R. 14–15). This amount was computed on the basis of the 6.63 cents per pound ceiling price in effect on the date of the requisition (R. 14–15) Fifty per cent of the award was paid to them on November 27, 1945 (R. 15), and on October 3, 1945, this suit for just compensation was filed in the Court of Claims [5] (R. 1).

2. In addition to the foregoing, the Court of Claims also made the following findings: (a) In October 1944 (subsequent to the instant requisition), the Office of Price Administration, after obtaining an informal agreement from Commodities to sell about 7,000,000 pounds at a higher price, increased the ceiling price to ten cents per pound (R. 19). In June 1945, Commodities sold approximately 124,000 pounds of pepper to consignees in Puerto Rico at various prices averaging 14,19 cents per pound (R. 19); the then Price Schedule permitted an exporter to add to the ten cents domestic ceiling, his usual pre-war export mark-up plus 25% thereof (R. 19). In March

[5] Approximately three months after the institution of this action, Commodities was dissolved by the voluntary action of its stockholders (R. 12). Pursuant to the plan of dissolution, the company's assets, including its claim in this proceeding, were distributed in kind to the stockholders, in proportion to their holdings (R. 12–13). The stockholders, upon being permitted to intervene in the Court of Claims as parties-plaintiff in this proceeding, have adopted the petition therein filed and the proceedings had (R. 7–10, 13).

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1946, again following negotiations between Commodities and the Government, the ceiling price was increased to 16 cents per pound, and thereafter Commodities sold its remaining inventory of about 3,000,000 pounds at that price (R. 19). After the removal of price ceilings in August 1946, pepper was actively sold at 50 to 60 cents per pound and upward, and at 40 cents a pound and upward for future delivery in three or four months (R. 18).

(b) During the years 1943 and 1944, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper, at a ceiling price of 16 cents a pound (R. 18–19). Imitation pepper, made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent sold for approximately 16 cents a pound (R. 19). The ceiling price for ground black pepper was then 12½ cents per pound (R. 19).

(c) Next to Sumatra, British India is the largest producing country of black pepper (R. 21). Although it consumes approximately 75 percent of its pepper, exporting the balance, the Allied Food Commission, prior to 1944 and in 1944, did allocate 10,000,000 pounds of Indian pepper for the United States (R. 21). During 1944 the price of Indian pepper delivered in New York, including insurance and freight paid to New York, fluctuated as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.90		

However, because Revised Price Schedule 52 provided that no one could purchase or import pepper at higher than the 6.5 cents per pound ceiling price, American importers were unable to take advantage of the allocation of British pepper (R. 21).

(d) The pepper requisitioned by the Government is identified by lot numbers from purchases by Commodities from October 1933 to January 1936, amounting to 5,805 bags, or 773,201 pounds net, at an invoice cost of $53,143.13, an average of 6.21046 cents per pound (R. 21). By the time it was requisitioned, it had been carried by Commodities for periods averaging nine years and 4½ months, and its total cost to Commodities including carrying charges, allowance for shrinkage and for general administrative expense, but excluding officers' salaries, supervision and purchasing expenses, resulted in an average cost to Commodities of 12.7 cents per pound (R. 21–22). This cost included substantial charges for storage, insurance, taxes, and financing incurred during the period after establishment of the ceiling price during which Commodities refused to make sales (R. 21–22).

(e) Because of the nature of the pepper vine and the conditions under which it is grown in

Sumatra, there is about a five-year time lag before prices can affect the crop (R. 22). The reduction in crops in 1937, 1938, 1939 had had, by 1941, sufficient effect in raising prices so that new plantings might have been made by 1942 (R. 22). "If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946 when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (R. 22–23).

3. In determining just compensation, the Court of Claims refused to be governed by the concurring opinion of Mr. Justice Reed in *United States* v. *Felin & Co.*, 334 U. S. 624, 642, and rejected the applicable maximum price as the measure of just compensation, because the property requisitioned was non-perishable (R. 24–25). "This is so because the owner of nonperishable property has the right to hold it until after restrictions are removed and then to sell it" (R. 25). It held that because of the owner's right to retain the property, just compensation must be fixed on the basis of "retention value," which it considered particularly applicable here, since Commodities, being an "investor" rather than a trader in pepper, "had accumulated its stock in the expectation that there would be a considerable rise in the price of pepper, at which time it ex-

pected to dispose of it" (R. 25). In arriving at retention value, the court considered the "very great rise in price [which] was inevitable upon the removal of restrictions" (R. 26), and the rise in price, which but for the war, would probably have resulted due to curtailment of planting (R. 25–26). It further considered the cost of the pepper to Commodities and the sales subsequent to the requisition at the increased ceiling prices and concluded that the fair value of the pepper on May 26, 1944, the date on which it was requisitioned, was $113,962.63, or 15 cents a pound (R. 26–27). Judge Madden dissented on the ground that the ceiling price was the proper measure of just compensation (R. 28–30). Chief Judge Jones did not participate (R. 30).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 156

The Court of Claims erred:

(1) In failing to hold that the maximum price in effect at the time the pepper was requisitioned, validly established by the Office of Price Administration, was the proper standard of just compensation therefor.

(2) In holding that the determination of just compensation in time of war or national emergency must take into account "the plaintiff's right to hold its property until restrictions on its disposition are removed" and "his right to hold his property until he can get for it whatever any one is willing to pay."

(3) In fixing as just compensation for the pepper requisitioned an amount in excess of the maximum price therefor at the time of the requisition, as fixed by the regulations of the Office of Price Administration.

(4) In entering judgment for respondents in the amount for which it was entered.

SUMMARY OF ARGUMENT

On the requisition by the War Department of 760,000 pounds of its 17,000,000-pound stockpile of whole black pepper, in May 1944, Commodities was offered, and rejected, the valid O. P. A. ceiling price of some 6.63 cents per pound. The Court of Claims has disregarded the maximum price and awarded 15 cents per pound, taking into account the sums which the owner could have secured for the pepper had it been permitted to hold it until after wartime restrictions had been removed. Commodities claims that 22 cents should have been allowed. It is our argument that (a) the lawful ceiling price constitutes the proper measure of just compensation, (b) in any event, the Court of Claims' findings do not support its award of 15 cents, and (c) Commodities is not entitled, on any theory, to an increased judgment.

I

A. The Fifth Amendment protects the fundamental right to be free of confiscation, but it does not provide any specific measure, amount, or rule,

nor does it demand that the subsidiary standards which are normally used during times of peace must be applied in wartime. The only basic constitutional criterion for awards to an owner of requisitioned property is that his compensation be fair and just, both to him and the public, in the prevailing circumstances. And the circumstances and conditions of wartime necessarily affect the determination of what is a "just" award for war takings.

B. Valid wartime price ceilings normally satisfy this constitutional standard, for, in the absence of a successful challenge in the Emergency Court of Appeals which was available for that purpose, they must be accepted, under the Price Control Act, as "generally fair and equitable," and by their very nature they were also fair and equitable to most individuals. Unless a particular owner can present convincing proof that special circumstances make application of the ceiling price unjust and unfair to him, that price should be the maximum measure of just compensation for a taking for war purposes. The fact that prices are limited by the ceiling, and the market is not "free," is no obstacle to this result, for valid legal restrictions have always been taken into account in determining "value" or just compensation. The "loss" suffered by the owner because he does not receive an award in excess of the ceiling does not differ from that suffered, in wartime, by all others selling goods subject to price

control. This is a "burden of common citizenship" in wartime, and the owner of commandeered property should not be singled out to be recompensed for this deprivation.

On the other hand, maintenance of an effective price control system would be seriously endangered if sellers of products needed by the Government could count on securing over-ceiling prices by insisting on requisition. For, during a war period, Government buying dominates the market, and there is little promise of restricting prices in general to reasonable levels if prices on sales to the Government are not effectively monitored.

C. Commodities cannot rightfully complain that the pepper ceiling price was unfair as applied to it. At the time it was imposed in December 1941 and February 1942, the ceiling price admittedly equalled the free market price, and was higher than the average price for the preceding six years. It was never challenged in the Emergency Court of Appeals. After its establishment, very substantial trading occurred at this ceiling price, so that the American stockpile of 78,000,000 to 100,000,000 pounds (in March 1942) was reduced to 28,000,000 pounds by September 30, 1943. Trading ceased because Commodities, and a few like-minded holders, refused to sell, and further imports from Indonesia were prevented by the Japanese occupation of that territory. Commodities insisted on retaining its 17,000,000 pounds,

and as a result by September 1943 it held 60% of the supply available in this country.

In these circumstances, the ceiling price reflected a fair market value which is binding on Commodities even under the conventional standards of just compensation. The ending of active trading should, in fairness, be disregarded, because it was brought about by the deliberate action of Commodities, which had made itself a near-monopolist, and resort should be had to the earlier active market constituted by owners willing to sell and purchasers willing to buy—a market which indicates that the price ceiling did constitute a fair basis for trading. Any increase over the ceiling price, if it were allowed, would come about because of the combination of the wartime scarcity of pepper with Commodities' powerful near-monopoly, and cannot be viewed as a fair or just value for which compensation should be made.

Moreover, the Price Administrator specifically found that the ceiling was fair and equitable as applied to Commodities, and nothing is presented here to invalidate that administrative conclusion. Most of Commodities' arguments really challenge the price ceiling as a whole, and those objections are not open here, since neither it nor any other holder of pepper sought review in the Emergency Court. The one individual complaint is that the cost of its pepper far exceeded the ceiling price, but, even if individual cost were a proper factor to consider where a market has existed, the claim

would not be valid. For the high costs Commodities pleads stem from the double facts that (a) Commodities itself chose the particular bags of pepper to be delivered in response to the requisition, and it selected its high-cost pepper, and (b) its policy for some years appears to have been to retain its higher-cost goods (purchased mostly from 1933 to 1936) and to dispose of the lower-cost supplies (purchased from 1937 to 1939), so that at the time of requisition its pepper then on hand had a particularly high average cost. On the fairer "first-in, first-out" basis used by the Price Administrator, Commodities' cost would be much lower, and the claim of special unfairness could hardly be sustained.

D. Despite all these facts and factors, the Court of Claims thought that the ceiling price should be rejected because the owner was entitled to be compensated for this non-perishable property's "retention value", i. e., the price which it would secure after the lifting of controls. But, in our view, "retention value" has no proper place in just compensation determinations for war takings. In the first place, it is far too speculative, since the course of the war, the duration of controls, general post-war conditions, and the particular owner's post-war circumstances cannot be gauged at the time of taking, except by inspired prophecy. That is particularly true here, where the post-war price of pepper—under Commodities' own theory—would depend largely on the

then unknown state of production in Japanese-occupied Dutch East India. Secondly, "retention value" seems normally to be rejected in eminent domain proceedings even in peacetime. If, for instance, all of Commodities' pepper had been taken at the market price in November or early December 1941—before controls were instituted—it could not claim this type of "value", under the traditional rules, although it clearly intended to retain its pepper for still higher prices.

Above all, inclusion of "retention value" is unfair to the public and to other owners. It is unfair to the public because this value-increase (i. e., the anticipated post-war price rise) is usually directly attributable to the tensions, dislocations, and emergency conditions of wartime, and it is not fair to force the Government to allow the owner to take an individual benefit, at the general expense, from this war-created increment in value—as Commodities has been allowed here. Consideration of "retention value" is, moreover, unfair to other traders and owners—like the many smaller holders of pepper who sold at ceiling prices—who do not have the resources to keep their goods for indefinite periods, and therefore cannot claim compensation on this account. The result is that the strong are reimbursed for their strength and for their ability to withstand the pressures of the wartime economy.

Finally, exclusion of this anticipated increment is not unfair to the owner. The deprivation he suffers, if there be any, is wholly comparable to, and no greater than, the non-compensable losses endured by many segments of the nation, as a result of the total mobilization of effort, manpower, and property required to prosecute the war. Selective service; the allocations and priorities systems; universal price and rent control; limitations on wages, strikes, and job freedom; contract renegotiation and royalty adjustment—all bring certain hardships or losses of anticipated benefits. The property owner's loss of an anticipated post-war price-increase is of the same order, and frequently less severe in its incidence. In these conditions of wartime life, and in view of the general restraints on freedom and action, it cannot be deemed unjust to limit his compensation to the validly-established, generally fair and equitable, price ceiling. Indeed, the intrinsic fairness of excluding value-increases due to the war is strongly attested by the wartime eminent domain legislation of England, Canada, Australia, New Zealand, and France—each a democratic nation which has long followed the principle of awarding just compensation for requisitioned property.

E. Acceptance of the price ceiling as the proper measure of just compensation would not invade the judicial function in requisition pro-

ceedings. Even if one accepts the principle that the courts alone have the power to develop and establish the rules and measures governing eminent domain awards, there is nothing to prevent the courts from independently accepting and using valid price ceilings.

II

Commodities' claim (in No. 163) that it is entitled to an award of 22 cents per pound should be rejected, regardless of whether the Court accepts our view that the price ceiling is determinative. In fact, the Court of Claims' findings, and the evidence, do not even support the allowance of 15 cents. None of the separate factors brought forth by Commodities justifies either its additional claim or the extent of the lower court's award.

A. Much is made of the court's failure to accord enough weight to the so-called normal "cycle" of pepper prices, as showing what prices would have been if there had been no war. Passing the hypothetical nature of the inquiry, the theory is demonstrably inconclusive, and cannot be used with any degree of accuracy to reconstruct the level of 1944 prices, absent the war. The Court of Claims gave the theory too much, not too little, consideration.

B. Commodities' claim of high costs rests, as we have said, largely on its own choice of the

higher-cost bags of pepper to retain and to furnish to the Government, as well as on cost-elements which are plainly not includable.

C. Its demand for a further allowance on account of "retention value" (assuming that this factor is to be considered at all) exposes no more than a limited disagreement with the lower court, in which the court's evaluation is at least as reasonable and realistic as Commodities'.

D. After the ceiling price was raised to 10 cents in October 1944, and to 16 cents in 1946—as a last resort in the effort to induce Commodities to dispose of its stocks—Commodities did make sales, but the circumstances in which the price levels were raised, and the pressures exerted by Commodities' monopoly position, bar the use of these sales as the standard for measuring just compensation in this case, so far as the Government is concerned. Commodities, on the other hand, did agree to make substantial sales at these prices—thus indicating its own belief that the prices were not unreasonable or confiscatory.

E. Pepper was offered for sale in India for delivery in New York, during the war, but could not be lawfully imported into this country because of our price ceilings, and none was brought in for domestic use. Accordingly, Commodities' reliance on the Indian price is baseless, for American buyers and sellers could not avail themselves of this source.

F. Finally, there is no merit to the various contentions based on the special ceiling prices for pepper which co-existed with the general maximum which was admittedly applicable to Commodities. These other maxima are either clearly inapplicable; or there is an entire absence of proof that Commodities could bring itself within the special classes permitted to sell at those prices; or there is a similar failure to disprove the probable fact that if Commodities had availed itself of those prices it would have incurred counter-balancing costs which would have to be taken into account in this proceeding.

ARGUMENT

This case, like *United States* v. *Felin & Co.*, 334 U. S. 624, involves the soundness of a Court of Claims' judgment fixing just compensation for property requisitioned by the Government for war purposes at an amount in excess of the price-ceiling legally established by the Office of Price Administration. In May 1944, the War Department, acting as the President's delegate under the Requisitioning Act of 1941, took 759,750.88 pounds of Commodities' 17,000,000 stockpile of whole black pepper, an imported spice which had become very scarce because the Japanese had overrun the principal sources of supply. During this period of increasing shortage, Commodities refused to sell its holdings, while most other owners of pepper disposed of their stocks. As a result, at the time of requisition Commodities

owned more than 60% of the total domestic stockpile, and the Army was forced, in order to procure its supply, to invoke the eminent domain power. The general O. P. A. maximum price of 6.63 cents per pound for pepper, which the Government offered to pay Commodities as just compensation, was never challenged in the Emergency Court of Appeals; when established, early in 1942, it reflected the free market price, and it was the price at which some 80 to 90% of the domestic holdings of pepper—other than those owned by Commodities—were thereafter bought and sold.

The rejection by the Court of Claims of this price ceiling as the correct measure of just compensation, we believe, to be in conflict with the principles of fairness and justice which, under the Constitution, are decisive in making awards for compulsory takings. Point I deals with this serious error of the lower court. In Point II, we shall show that, in any event, Commodities cannot rightfully claim, as it seeks to do in No. 163, an amount greater than the 15 cents per pound allowed below, and also that the court's findings do not support even that figure.

I

THE MAXIMUM PRICE VALIDLY FIXED BY THE OFFICE OF PRICE ADMINISTRATION WAS THE PROPER MEASURE OF JUST COMPENSATION FOR COMMODITIES' PEPPER REQUISITIONED FOR WAR USES

A. THE CONSTITUTIONAL STANDARD OF JUST COMPENSATION

The central conception of the Fifth Amendment's prescription that "just compensation" be paid by the public when it requisitions private property is that the owner's goods must not be confiscated without payment, that the sovereign must pay a reasonable award for the property, and that compensation must be made which is fair and just both to the owner and to the public. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579–580. "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the [land]owner" (*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 280), and a balance is struck "between the public's need and the claimant's loss." *United States* v. *Toronto, Hamilton and Buffalo Nav. Co.*, this Term, No. 39, decided December 12, 1949, slip op., p. 5. The constitutional requirement of "just compensation is a practical conception * * *" (*United States* v. *Felin & Co.*, 334 U. S. 624, 641), and in developing the governing judicial measures, this Court has been quick to mold the rules to conform to its ideas of

fairness and substantial justice. *United States* v. *Miller*, 317 U. S. 369, 373, 374–375; *United States ex rel. T. V. A.* v. *Powelson, supra; United States* v. *Toronto, Hamilton and Buffalo Nav. Co., supra;* cf. 1 Bonbright, *The Valuation of Property* (1937), p. 409, and the whole of ch. XVI ("Valuation Under the Law of Eminent Domain"). In particular, the Court has endeavored to establish rules which are fair not only to property owners but to the public as well. *Searl* v. *School District, Lake County*, 133 U. S. 553, 562; *Garrison* v. *City of New York*, 21 Wall. 196, 204; *Bauman* v. *Ross*, 167 U. S. 548, 574; 2 Lewis, *Eminent Domain* (3rd Ed., 1909), p. 1175.

The Constitution does not incorporate any particular standard or measure of payment—be it "market value" or "value" of any type[6]—and,

[6] "Nowhere in the Constitution, however, is there any definition of 'just compensation'; and its identification both with the principle of indemnity and with an award based on the 'fair value' of the property is purely a matter of judicial interpretation or lawmaking." 1 Bonbright, *The Valuation of Property* (1937), p. 409.

The debates on the adoption of the Fifth Amendment cast no light on the meaning which the "just compensation" clause was thought to have. James Bradley Thayer [1 *Cases on Constitutional Law* (1895), p. 945] suggests that the pertinent writings of Grotius and other early publicists "bring out the conceptions upon this subject which the framers of our first constitutions entertained." Grotius says (in general terms which contain no reference to particular measures like "market value"), that in exercise of the power of eminent domain, "compensation from the public funds [should] be

as recent opinions emphasize, mechanical, mathematical, or routine standards often have been rejected because of the demands of equity. *United States* v. *Miller, supra,* at 373–377, for instance, summarizes the conventional judicial rules, with great stress on the requirements of fairness; even in dealing with the accepted measure of "market value," the Court underscores the concept of "'*fair*' market value," and points out that "* * * strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must *in fairness* be eliminated in a condemnation case * * *" (317 U. S. at 375, italics sup-

made, if possible, to the one who has lost his right," and the "state is bound to make good at public expense the damage to those who lose their property." *De Jure Belli ac Pacis*, Bk. II, ch. 14, sec. 7, Bk. III, ch. 20, sec. 7 (Classics of Int. Law trans. of 1646 ed.). Vattel states that "justice requires that compensation be made to the community or the individual from the public treasury; and if the treasury cannot meet the charge upon it, all the citizens are bound to contribute to it for the burdens of the State should be borne equally by all, or in just proportion." *Le Droit des Gens*, Bk. I, ch. 20, sec. 244 (1758). Blackstone refers—somewhat overbroadly—to the "great * * * regard of the law for private property," and says that the sovereign does not act "by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained," which he sums up as "a reasonable price." I *Commentaries* 139 (Chitty's ed. 1866). See, generally, on early conceptions of eminent domain, Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1931), 6 Wis. L. Rev. 67; Lenhoff, *Development of the Concept of Eminent Domain* (1942), 42 Col. L. Rev. 596.

plied). Similarly, *United States ex rel. T. V. A.* v. *Powelson, supra,* at 279–280, refers to considerations of "equity and fair dealing" in determining proper measures of compensation. See also *United States* v. *Petty Motor Co.,* 327 U. S. 372, 373–378; *United States* v. *Felin & Co., supra; United States* v. *Toronto, Hamilton and Buffalo Nav. Co., supra,* slip op., pp. 5, 8. At the last Term, the Court had the occasion to summarize this thesis in *United States* v. *Cors,* 337 U. S. 325, 332:

> The Court in its construction of the constitutional provision has been careful not to reduce the concept of "just compensation" to a formula. The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice. But the Amendment does not contain any definite standards of fairness by which the measure of "just compensation" is to be determined * * * The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value.

Thus, the only fundamental measuring rod laid down by the Fifth Amendment—and, consequently, the only basic standard to be applied in this case—is that the compensation to be paid to the owner be fair and just both to him and to the public. And to the extent that the subsidiary standard of "market value" is to

be used, it must be a "*fair* market value," from which all elements tending toward an inequitable result have been abstracted.

What is fair and just both to the public and to the owner depends, in large part, upon the circumstances and conditions prevailing at the time of taking. During a period of total war—when the efforts of the entire country are directed from normal peacetime pursuits to the all-out effort successfully to protect the nation, its peoples and property, from enemy aggression—the elements to be weighed and evaluated in determining what is equitable will differ sharply from the normal criteria. The Government, of course, recognizes that the country's participation in a war does not suspend the Fifth Amendment's requirement that just compensation be paid for requisitioned property. However, the philosophy underlying the Fifth Amendment's prescription requires, in war-taking cases, a close scrutiny of the subsidiary rules which have been evolved for the fixing of just compensation in peacetime, against the ultimate constitutional standard of fairness. In wartime, a new and different set of considerations comes into play, considerations which, in our view, require that the conflict of public *vis a vis* private interests, which the just compensation conception is designed to resolve, should be resolved somewhat differently than it would be in times of less stress and public urgency.

B. VALID CEILING PRICES NORMALLY SATISFIED THE CONSTITUTIONAL STANDARD OF JUST COMPENSATION

1. *Ceiling prices were fair and equitable, both generally and, in most instances, to the particular individual.*—Ceiling prices fixed by the Price Administrator under the Emergency Price Control Act normally met the basic constitutional requirement of fairness and equity, for under Section 2 (a) of that Act a ceiling price fixed by the Price Administrator was required to be that which "in his judgment will be generally fair and equitable." Section 2 (a), 50 U. S. C. App. 902 (a). The prices were to be fixed with "due consideration" given to the prices in a normal market, *i. e.*, "the prices prevailing between October 1 and October 15, 1941 (or if * * * the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative)."[3] In these circumstances, as the Court of Claims said in an earlier case in

[3] Section 2 (a) goes on to require the Administrator to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in cost of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

which it independently concluded that the maximum price constituted the proper award, "that the ceiling price fixed by the Price Administrator happens to be the [just compensation] found by the court, is not surprising in view of the statutory basis on which the Administrator is bound." *Walker* v. *United States*, 105 C. Cls. 553, 580.

The Price Control Act further provided for the filing of complaints, first with the Price Administrator (Section 203, 50 U. S. C. App. 923), and if rejected by the Administrator, with the Emergency Court of Appeals (Section 204, 50 U. S. C. App. 924), questioning whether the ceiling price adhered to the statutory standard, *i. e.*, whether it was "generally fair and equitable." Such a challenge could be made not only immediately after a price ceiling or a maximum price regulation was issued, but at any later time if subsequent events showed that it no longer satisfied the statute's requirement. *Schanzer* v. *Bowles*, 141 F. 2d 262 (Em. C. A.); *Capitol Foundry Co.* v. *Bowles*, 146 F. 2d 855, 857 (Em. C. A.); cf. *United States* v. *Sanitary District of Chicago*, 149 F. 2d 951, 955 (C. A. 7).* In the absence of a successful direct attack upon the

* On the continuing jurisdiction of the Emergency Court of Appeals, see its recent opinions in the subsidy cases: *Belle City Packing Co.* v. *R. F. C.*, 169 F. 2d 413, 414; *Wm. Schluderberg-T. J. Kurdle Co.* v. *R. F. C.*, 169 F. 2d 419, 420; *Merchants Packing Co.* v. *R. F. C.*, No. 487, decided September 29, 1949; *Duncan Coffee Co.* v. *R. F. C.*, No. 500, decided December 16, 1949. Cf. *Woods* v. *Hills*, 334 U. S. 210.

ceiling price (in the Emergency Court of Appeals, or, on certiorari, in this Court), it was to be considered valid in all courts, state and federal.[9]

It is true that the prices so fixed were held to satisfy the statutory requirement if they were fair and equitable to the industry generally, irrespective of their impact upon a particular individual (see, *e. g.*, *Bowles* v. *Willingham*, 321 U. S. 503, 516–518; *Wilson* v. *Brown*, 137 F. 2d 348 (Em. C. A.); *Fournace* v. *Bowles*, 148 F. 2d 97, 101 (Em. C. A.), certiorari denied, 325 U. S. 884), but it was the abnormal case, characterized by special or unique circumstances, in which a ceiling price which was "generally fair and equitable" was not also fair and equitable to a particular property owner or vendor. Especially where, as in the present case, the maximum price was di-

[9] Section 204 (d) of the Price Control Act (50 U. S. C. App. 924 (d)) provided, in part:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision."

rectly based on an active and widespread market in this very commodity, would it be unlikely that a valid ceiling would be unjust to a particular individual. *Infra,* pp. 45–57. In addition, provisions were made in many maximum price schedules for special adjustments and relief of those individuals who could show that the general price ceiling adversely affected their particular operations. *Armour & Co. of Delaware* v. *Brown,* 137 F. 2d 233, 236, fn. 2 (Em. C. A.); see, for example, the regulations involved in *Goodman* v. *Bowles,* 138 F. 2d 917 (Em. C. A.); *Capitol Foundry Co.* v. *Bowles,* 146 F. 2d 855 (Em. C. A.); *Armour & Co.* v. *Bowles,* 148 F. 2d 546 (Em. C. A.); *American Brake Shoe Co.* v. *Bowles,* 151 F. 2d 195 (Em. C. A.); see, also, OPA Procedural Regulation No. 1, secs. 1300.35–1300.41, 7 Fed. Reg. 971, 974–5 (issued February 12, 1942); Revised Procedural Regulation No. 1, secs. 1300.9–1300.23, 7 Fed. Reg. 8961, 8962–3 (issued November 2, 1942).

Thus, the maximum prices established by the O. P. A., which were not overthrown on appeal, bear the unquestioned stamp of validity. By the same token, they were also "generally fair and equitable" to the particular trade or industry at any given time, and, except in unusual circumstances, they were likewise "fair and equitable" to the individual seller or property owner. Concomitantly, they furnished, of course, the only price at which any person subject to the maximum price regulation could lawfully sell his products,

and also validly limited the sums he could properly obtain on the market, or otherwise, by a voluntary sale.

2. *Valid price ceilings should be adopted as the normal maximum measure of just compensation for wartime takings.*—There is no obstacle, in our view, to adoption of valid price ceilings as the normal maximum measure of just compensation for wartime takings, and there are many good reasons why this should be done.[10] The lawful ceiling price should be decisive unless the owner can show that, even though it must be regarded as generally fair and equitable and therefore binding, it is not fair and just in its individual application to him, because of certain special circumstances. Absent such unique proof, payment of the ceiling price is fair and just to the owner, the public, the Government, and to other property-owners or traders. The loss or deprivation suffered by the

[10] At the outset, we may point out that there is no past decision of this Court rejecting valid general price ceilings as a measure of just compensation. *United States* v. *New River Collieries Co.*, 262 U. S. 341, which is sometimes cited as having ruled to that effect, involved an active and free export market in which the owner customarily traded and in which it would have sold the coal if it had not been requisitioned. This export market was entirely uncontrolled and was readily available. Only the lower domestic market, in which the owner usually did not trade, was controlled. On the other hand, the companion case of *L. Vogelstein & Co.* v. *United States*, 262 U. S. 337 (discussed below at pp. 54–55; 70–71), involved a controlled-price situation closely approaching that of a valid general price ceiling, and the controlled price was held the measure of just compensation. The cryptic opinion in *Davis* v. *Newton Coal Co.*, 267 U. S. 292, does not appear to have been intended to pass on this issue.

owner through use of the maximum as the measure of his award is of exactly the same order as the unreimbursed loss which comes to many elements of the national community during a grave and serious war, and compensation should not be made for it to owners of requisitioned property alone.[11] We believe that this should be the

[11] We do not urge that there is anything in the Emergency Price Control Act *requiring* that ceiling prices be used as the measure of just compensation. Section 4 (d) of the Act, 50 U. S. C. App. 904 (d), provides that "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." On the other hand, there is nothing in the Act, or its legislative history—or in the general requisitioning act of 1941 and 1942 (involved here), or the legislative history of that statute—*preventing* the use of ceiling prices, *qua* ceiling prices, as the proper measure of just compensation, if the Fifth Amendment's prescription is satisfied by awards limited by a valid maximum price. See Supplemental Brief for the United States, in *United States* v. *Felin & Co.*, 334 U. S. 624, Oct. Term, 1946, No. 862, Oct. Term, 1947, No. 17. See *infra*, pp. 88–92.

As we understand the remark in *Bowles* v. *Willingham*, 321 U. S. 503, 516–517, that price control did not involve a "taking" of property, the Court pointed out no more than that price ceilings which were generally fair and equitable might be unfair and inequitable as applied to particular landlords or vendors, but that this did not invalidate the ceiling as a regulatory measure, though it might affect the use of the ceiling as the measure of just compensation in a requisition directed against that particular person. The Court did not hold, or intimate, that valid maximum prices—which were necessarily fair and equitable in general—could not be the normal measure of compensation in requisitions directed against those many persons to whom the ceiling was also individually fair and equitable, or to whom it would not be unjust to apply the ceiling. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 156–8, and *Federal Power Comm.* v. *Hope Natural Gas Co.*, 320 U. S. 591, both cited in the *Willingham* case, *supra*.

rule regardless of whether or not active trading is occurring, at the ceiling price, at the time of taking, and whether or not the ceiling price equalled the "free market price" at the time it was imposed.[12]

(a) The fact that there is a legal limitation on the upward movement of price, and that the market is not "free," does not, in itself, detract from the propriety of using the ceiling to determine the prescribed compensation. The maximum is, at least, generally fair and equitable; by definition, it is a lawful restriction; it is what the owner would obtain from a private buyer; it is the price he would have to pay for a replacement, if one were available; and it necessarily enters into the then value of the requisitioned property, on any theory of value. That it happens to be a "legal control", rather than a physical or economic restriction, does not set it apart, or permit

[12] In the present case, it is clear that the ceiling price did approximate the market price at the time it was imposed, that there was very substantial trading at the ceiling price for at least several months, and that the cessation of active trading occurred, not because the price was no longer generally fair and equitable, but because (a) large holders like Commodities, who held the bulk of the remaining stocks, refused to sell, and (b) there were no new imports of pepper into the United States during the war. *Supra*, pp. 4–8. We show below (*infra*, pp. 45–66) that the ceiling price was not only generally fair and equitable, but also fair and equitable to Commodities, and also urge (*infra*, pp. 45–57) that if the conventional standard of "fair market value" be followed, the ceiling price is the proper measure in this particular case.

it to be disregarded. There are in actual fact very few market places where there is the free market said to be visualized by Adam Smith—a market where the completely free interplay of supply and demand sets the price. There are usually economic rigidities as well as government-imposed conditions which result in a limitation on the value of the property. The value of real estate, for example, may be severely curtailed and limited by government-prescribed restrictions on its use, in the form of zoning ordinances. The just compensation for such property takes account of this limitation and reflects the reduced value. Cf. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 284; *Reichelderfer* v. *Quinn*, 287 U. S. 315, 323; see R. 30, Judge Madden dissenting.

In a war period, governmental restrictions of all kinds are the order of the day. As Judge Learned Hand said, in giving full effect to war-time priorities regulation in the condemnation proceeding of *United States* v. *Delano Park Homes, Inc.*, 146 F. 2d 473, 474 (C. A. 2):

> We cannot agree that the judge should have refused to consider the effect of "priorities." Nobody suggests that an owner whose land is not condemned, has any claim upon the United States because he cannot employ it profitably until the system ends. Yet to appraise the land without any deduction for a period during which it will bring in no income, is to re-

> imburse the owner pro tanto; a discount measured by commuting the losses, de die in diem, is necessary to avoid putting into a preferred class owners whose lands happen to be condemned, as against those who must bear the deprivation without relief. Otherwise condemnation will prove a bonanza. * * * In each case [referring to two earlier district court cases] the district court had assimilated the situation to that of a case where the market is upset by temporary variations of supply or demand, where it is indeed true that the immediate prices are not the proper measure of value. Certainly, when an owner can hold his property until the market recovers, it is unjust to allow him only current prices, for presumably he will wait for a recovery before disposing of his goods. Whether the same reasoning applies when he cannot wait, is another question; not decided, so far as we know. However that may be, when competent authority has fixed prices at a maximum, or has denied owners some specific use of their property, it is patently a disregard of its authority, either indirectly to allow a higher price on condemnation, or to allow the price to be figured in disregard of the limitation imposed. * * *

Such "governmental restrictions, unquestionably lawful and general in their scope * * * [are] actualities which circumscribed the market * * * Whatever may have been plaintiffs'

damage because of these restrictions, it may not be reflected in fixing just compensation for the taking." *Graves* v. *United States*, 62 F. Supp. 231, 233 (W. D. N. Y.). This is so, because "[a] distinction must be drawn between the consequences of a seizure and the consequences of the imposition of lawful war-time restriction on price, since the law is now well settled that the imposition of use and price is a proper exercise of sovereign war powers and that the resulting market conditions are lawful * * *. And since they are both lawful, actual and real, they must control." *Cudahy Bros. Co.* v. *United States*, 155 F. 2d 905, 907 (C. A. 7).[13]

The failure of the owner to secure the putative war-inflated price which he could get in the absence of price ceilings—and absent any system for controlling inflation—thus stems, not from the fact that his property was requisitioned, but rather is brought about by the imposition of the lawful price ceiling, and hence is not recoverable under our system of law. *Cf. Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5; *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Morrisdale Coal*

[13] See also *Louisville Flying Service* v. *United States*, 64 F. Supp. 938 (W. D. Ky.); *Lessner Plumbing & Heating Co.* v. *United States*, 64 F. Supp. 931 (S. D. N. Y.); cf. *Wilson Athletic Goods Mfg. Co.* v. *United States*, 161 F. 2d 915, 917–918 (C. A. 7).

Co. v. *United States,* 259 U. S. 188; *Block* v. *Hirsh,* 256 U. S. 135, 157–8; see *Nortz* v. *United States,* 294 U. S. 317, 329–330. Like any "loss due to an exercise of the police power," it should be "properly treated as part of the burden of common citizenship." *Kimball Laundry Co.* v. *United States, supra.* (See also *infra,* pp. 77-88). Nor would the owner be in a better position if he should limit his claim to a hypothetical sum which he judges he would have received from private purchasers had there been no war at all. The fact is that the war did intervene, and its existence necessarily affects the worth of his property, and what he can get for it. His inability to obtain on condemnation a theoretical peacetime price, if it be higher than the ceiling, does not differ from the similar inability of other vendors who sell voluntarily.

In short, there is no unfairness to the owner in excluding all consideration of a possible excess over the controlling price from the just compensation determination, since his claim for such excess arises solely because of the accident that his particular property, no more affected by the regulation than the property of all other persons, was requisitioned by the Government. Payment of the ceiling price will bring exactly the price which the goods would have brought in the market, or from a private person. Certainly it is unfair to disregard the ceiling price, and to award compensation on the basis of the prices or values which would have existed in its absence,

at the behest of persons who have refused to sell to the Government, while denying similar relief to the much larger class of persons who have voluntarily delivered their goods to the Government, or to other purchasers, and thereby in sales for private account have suffered the very same "losses." The owner of requisitioned property is not entitled to compensation for his unwillingness to sell to the Government; nor does he merit reimbursement for deprivations which everyone else is forced to bear without monetary recompense. Cf. *United States* v. *Sanitary District of Chicago*, 149 F. 2d 951, 955 (C. A. 7). See, also, Note, 60 Harv. L. R. 132, 136–137.

(b) On the other hand, permitting the owner of requisitioned property to receive more than the ceiling price would serve to frustrate the congressional purpose to stabilize prices at peacetime levels and thereby to prevent wartime inflation. Section 1 of the Price Control Act (50 U. S. C. App. 901) makes it clear that the Act was designed not only to protect private purchasers from the inflationary price rises consequent upon the wartime swollen demand, but also to protect the several governments in their capacity as purchaser. That section reads in part as follows:

> It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of

this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; *to assure that defense appropriations are not dissipated by excessive prices;* * * * *to prevent hardships* * * * *to the Federal, State, and local governments, which would result from abnormal increases in prices;* * * * and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. [Italics supplied.]

It needs little demonstration that if sellers, like Commodities here, could avoid the effect of maximum price regulations issued under the Price Control Act simply by withholding their products from purchaser governments, and awaiting requisition, the congressional purpose expressed above would be largely defeated. Moreover, the disregard of price ceilings on government acquired goods would make difficult, if not impossible, effective price regulation by Congress in the general wartime economy. The Government cannot hope effectively to stem the tide of war inflation if the products involved in its own procurement program must remain free from price control. During a period of war,

Government-buying dominates the markets,[14] and the legally-established maximum prices would cease to have much meaning if the Government were put in the position of procuring needed property by requisition, rather than by voluntary cooperation, and were required to pay more than the maximum prices. Those fortunately possessed, like Commodities, of a large share of a required commodity would be impelled by their own pecuniary interests to avoid and destroy the ceiling price structure by insisting on condemnation. See Note, *Legal and Economic Aspects of Wartime Price Control,* 51 Yale L. J. 819, 840–841; Marcus, *The Taking and the Destruction of Property Under a Defense and War Program,* 27 Cornell L. Q. 476, 528–530.

There is, consequently, little promise of generally restricting prices to reasonable levels dur-

[14] In World War II, there was "a demand for production of war supplies in proportions previously unimagined. [The] call [was] for production in a volume never before approximated and at an undreamed of speed. The results amply demonstrated the infinite value of that production in winning the war. It proved to be a *sine qua non* condition of the survival of the nation." *Lichter v. United States,* 334 U. S. 742, 763–765; and see pp. 758–765. Approximately half of our national annual output of some two hundred billion dollars worth of goods and service went to the local, State and Federal Governments, with the Federal Government by far the predominant purchaser. Sixth Report of Director of War Mobilization and Reconversion, April 1, 1946, H. Doc. 524, 79th Cong., 2d sess., p. VI; Eighth Report of the Director of War Mobilization and Reconversion, October 1, 1946, H. Doc. 45, 80th Cong., 1st sess., p. 7.

ing time of war if the prices on sales to the Government are not effectively controlled. Cf. *Yakus* v. *United States*, 321 U. S. 414, 432. Nor is it any answer to suggest that the importance of the Federal Government as a buyer affords it ample opportunity to dictate prices by economic compulsion, and that legal sanctions are therefore superfluous. Cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289; *Lichter* v. *United States*, 334 U. S. 742, 758–765. The exigencies of a mobile and total warfare do not permit time for the play of economic forces, as this very case clearly indicates. See Note, *Legal and Economic Aspects of Wartime Price Control* (1942), 51 Yale L. J. 819, 840–841.[15]

[15] "With the size of Government purchasing reaching astronomical proportions, failure on the part of the Government as a buyer to adhere generally to established price ceilings can nullify the beneficial effects of price fixing. Fortunately, the inflationary tendency of numerous uncoordinated Government purchasers which featured the last war effort has been largely avoided. But even assuming an integrated buying organization, the pressure to spend prodigious sums of money in a hurry and necessity for speedy procurement creates a situation in which some neglect of price ceilings may be inevitable." 51 Yale L. J., at 840–841.

The same commentator also remarks: "Where there is a price ceiling in operation, it is inconsistent with a policy of price control for a seller whose goods have been requisitioned to obtain a price higher than the ceiling." 51 Yale L. J., at 840, fn. 102. Also of the same view is Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 528–530. See, also, Note (1946) 60 Harv. L. Rev. 132, 136–137.

C. THE PRICE CEILING FOR PEPPER, AS IT APPLIED TO COMMODITIES, SATISFIED THE CONSTITUTIONAL STANDARD FOR JUST COMPENSATION

We have urged, thus far, that a validly-established price ceiling normally constitutes the proper maximum measure of just compensation on a taking, and that it should be accepted unless the owner can prove that special circumstances exist, rendering the application of the price ceiling unfair and unjust in his particular case. *Supra*, pp. 30–44. Here, we show that the maximum price for whole black pepper, which must be regarded as generally fair and equitable, was not unfair or inequitable as applied to Commodities.

The burden of proof in all eminent domain cases rests, of course, on the claimant,[16] and in a case such as this, where a valid general price ceiling is alleged to be unfair to the particular owner, the burden is a heavy one, and strong and convincing proof should be offered. That burden Commodities has not borne, and we might, perhaps, rest on that failure. But we wish affirmatively to demonstrate that the pepper price ceiling was fair and equitable to Commodities as well as to other holders of the spice.

1. *The ceiling price for pepper, and the wartime transactions in pepper.*—"Pepper * * * is

[16] *United States* v. *Toronto, Hamilton, and Buffalo Navig. Co.*, this Term, No. 39, decided December 12, 1949, slip op., p. 9; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273; *United States* v. *Felin & Co.*, 334 U. S. 624, 631.

the most important and widely distributed spice used by the American housewife and by packing industries."[17] It is wholly an import, the natural commodity being grown in the Far East (R. 15). On December 7, 1941, there was a large stockpile of whole black pepper in the hands of importers in the United States (R. 16–17), but it was plain that the course of the war might prevent further importations for a considerable period.[18] Further, "pepper is one of the imported commodities which in the past have often been sharply influenced by speculative price manipulations," and immediately after the outbreak of hostilities in the Far East on December 7th there was a "sharp increase in speculative activity."[19]

(a) These considerations led the Office of Price Administration—then acting under the authority of Executive Order No. 8734—to issue a ceiling price on whole black pepper, on December 11, 1941, of 6.75 cents per pound ex dock or warehouse in New York (R. 15).[20] After the passage of the Emergency Price Control Act, and after further pepper studies, the Office of Price Administration issued, on February 3, 1942, a permanent

[17] From the preamble to the Office of Price Administration's maximum price regulation for pepper (Maximum Price Schedule No. 52), OPA Price Service Food Desk Book, Vol. 2, p. 16701, 7 Fed. Reg. 1308. See fn. 1, *supra*, pp. 4–5.

[18] See fn. 17, *supra*.

[19] See fn. 17, *supra*.

[20] For the formal statement of considerations for issuing this temporary ceiling, see fn. 1, *supra*, pp. 4–5.

price schedule, setting the ceiling price at 6.50 cents per pound, to which were added labor charges for storing the pepper and taking it out, and storage charges for not more than 30 days; on the average, these charges raised the price for pepper to about 6.63 cents a pound (R. 17).[21]

There is no doubt that these basic ceiling prices were founded on the market price as of that time. The Court of Claims found that "the ceiling price of 6.75 a pound for whole black pepper was approximately the fair market price as of December 11, 1941" (R. 16); two of Commodities' expert witnesses agreed that that was so (R. 59, 88).[22] And Commodities concedes that the permanent basic ceiling price of 6.5 cents was also the approximate market price at the time it was established (Br. 7, R. 88). In fact it was sub-

[21] At no time was the ceiling price for pepper challenged in the Emergency Court of Appeals. See *supra*, p. 31.

Maximum Price Schedule No. 52, as it applied at the time of taking (May 1944), is set forth in Appendix C, *infra*, pp. 125, 131.

[22] Commodities' claim that the market price at the time of the imposition of the price ceiling was "unduly" depressed because of the size of the stockpile, disregards the history of pepper prices in previous years, and ignores the speculation which then was taking place in the pepper market, which led the Price Administrator to request the increase of margin requirements and to impose a price ceiling almost immediately after war was declared. And this was still before the enactment of the Price Control Act—at a time when price ceilings were imposed only on selected commodities, the prices of which were already manifesting sharp inflationary tendencies. See *supra*, p. 46; *infra*, p. 98.

stantially higher than the average annual price for this type of pepper during the preceding six years. During most of that time, the price of pepper was well below 6 cents per pound: 5.5 cents (1936), 6.1 cents (1937), 5.4 cents (1938), 4.0 cents (1939), and 4.1 cents (1940). In the first eleven months of 1941, the average daily prices for each month were (in cents per pound): 4.1 (January), 4.5 (February), 6.2 (March), 6.3 (April), 6.9 (May), 5.8 (June), 5.9 (July), 6.1 (August), 6.0 (September), 5.8 (October), 5.8 (November) (R. 15). During the first week of December the average daily price was 5.78 cents per pound (R. 15). On December 11th, the market price had jumped to about 6.75 cents, which was established as the ceiling price (R. 16).

Between December 11, 1941 (when the temporary ceiling was imposed) and February 3, 1942 (the date of issuance of the permanent maximum price regulation), actual trading prices did not reach the 6.75 cents ceiling, the average price in January being 6.41 cents and the highest 6.45 cents (R. 16).

Active trading continued to take place at or below the temporary maximum, and, after its establishment, at or below the permanent ceiling (R. 16–18). By March 1942, when this country was finally cut off from the pepper producing areas (except India) by the Japanese military successes in the Pacific, there were about 78,000,000 to 100,000,000 pounds of whole black

peppers in American importers' hands—about three years' supply (R. 15). Conservation measures were taken by the government agencies interested in preserving food stocks (R. 17–18), but active selling continued—at the ceiling price—until this inventory had been drastically reduced to 28,000,000 pounds as of September 30, 1943 (R. 18, findings 14–15).

Out of this stockpile of 78,000,000 to 100,000,000 pounds available in March 1942, Commodities held approximately 17,000,000 pounds.[23] While others were selling many millions of pounds at the ceiling price, Commodities continued to retain its 17,000,000 pounds, and refused to make any substantial sales (R. 14, 18, 20), so that by September 30, 1943, it owned about 60% of the American stockpile. Between that date and the requisition date (May 26, 1944), very little whole black pepper was sold, and apparently none at all by Commodities (R. 18, 20). Active trading progressively diminished and finally ceased only after importers, other than Commodities (and a few others who likewise refused to sell), had disposed of their holdings, and replenishment of their stock had become impossible because we were cut off from our source of supply in Sumatra (R. 18).

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[23] On December 7, 1941, it held 21,000,000 pounds, but 4,000,000 pounds had been sold for future delivery (apparently at the then prevailing market price, *supra*, pp. 47–48), and these amounts were delivered early in 1942 (R. 14).

It is plain, then, that the cessation in active trading in this commodity by May 26, 1944, when the pepper was requisitioned, came about because (a) holders of pepper other than Commodities (and a few others) had sold their large stocks at the ceiling price, (b) no pepper was being imported into the country, and the usual sources of supply were in Japanese hands,[24] and (c) the remaining supply, already within the country, had become concentrated in the hands of a few persons, principally Commodities, which, as a pepper "investor" or speculator owning more than 60% of the total, insisted on holding its inventory, despite all pleas and efforts to have it make voluntary sales at the ceiling price.[25]

(b) In October 1944, subsequent to the instant taking, the ceiling price for whole black pepper was increased to 10 cents per pound. In March 1946, the price was raised to 16 cents per pound (R. 19). The monopoly position of Commodities,

[24] Black pepper was being produced in British India, but none was being imported into this country because its selling price was far above the lawful maximum price for imports into the United States (R. 21). See *supra*, pp. 10–11; *infra*, pp. 109–110.

[25] Commodities' desire fully to preserve its position is manifest from its vigorous resistance to the requisition from it of pepper for civilian use, in March 1944. *Commodities Trading Corp.* v. *Federal Surplus Commodities Corp.*, Civil Action No. 23573, United States District Court for the District of Columbia, was a suit for an injunction to restrain the taking as unauthorized by the Requisition Act of October 16, 1941 (R. 126–127). This resistance was successful, and pepper was not requisitioned for civilian use.

as one of the few holders of the spice at that time, was the basic force underlying both of these increases. In his Statement of Considerations for the first increase, the Price Administrator stated that persons holding the inventories then on hand had refused to sell at the 6.5 cents per pound ceiling price, and that "the War Food Administrator has reported that he has exhausted every means at his disposal for bringing forth the needed supply, and has advised the Director of Economic Stabilization that the only way in which the necessary civilian supply can be obtained is the granting of a maximum price increase." OPA Price Service, Food Desk Book, Vol. 2, p. 16,731.[28] See also Finding 19, R. 19. Both the increase to 10 cents and that to 16 cents were made after informal agreements had been obtained from Commodities to sell some of its holdings at the new price. About seven million pounds were sold at 10 cents, and the remainder was sold at the 16-cent price (R. 19).

(c) In short, the temporary ceiling price of 6.75 for whole black pepper was admittedly the approximate equal of the market price as of the date it was imposed (December 11, 1941) (R. 16); the permanent basic ceiling price of 6.5

[28] The Administrator also pointed out that "since the advent of the war in December of 1941, the foreign sources of supply for whole black peppers have been closed. The domestic market since that time has had to depend on the inventories then at hand."

cents[27] (established on February 3, 1942) likewise equaled the market price; in addition, it was substantially higher than the average annual price for this type of pepper during the preceding six years (R. 15); and during most of this time, the price of pepper was well below 6 cents per pound (R. 15). Moreover, during the month immediately preceding the fixing of the permanent price, not only was the average daily price below this ceiling, but at no time did the price go above 6.5 cents per pound (R. 16). Active trading continued at or below the ceiling price until the country's stockpile of 78 to 100 million pounds was reduced, in September 1943, to about 28 million pounds (R. 18), of which Commodities held 17 million pounds and like-minded owners appear to have held most of the balance. The maximum price was never challenged in the Emergency Court of Appeals, and it was only raised, in October 1944 and March 1946, as the final resort in the continuing effort to secure needed supplies of pepper for civilian use from Commodities and the others in the little group which held all the available stocks of the spice.[28]

[27] The Price Schedule permitted the addition of labor charges paid the warehouse for putting the pepper in storage and taking it out and warehouse storage charges for not more than 30 days, which, on the average, raised the ceiling price to about 6.63 cents. *Supra*, p. 47.

[28] The general 6.63 cents per pound ceiling is the only one relevant here. Commodities' claims that there were four or five other maximum prices at which it could have sold its

2. *The ceiling price as reflecting fair market value.*—(a) In these circumstances, the ceiling price clearly reflected free market value at the time it was established, and for many months thereafter it constituted the actual market value of whole black pepper in this country.[29] These facts would warrant its use as a measure of just compensation, even under the traditional doctrine that the market value of the property taken is the normal measure of just compensation. *United States* v. *Toronto, Hamilton and Buffalo Navig. Co.*, this Term, No. 39, decided December 12, 1949; *United States* v. *Miller*, 317 U. S. 369, 374. For the "worth of a thing is the price it will bring" (*Standard Oil Co.* v. *Southern Pac. Co.*, 268 U. S. 146, 158), and where the goods are traded on an actual market the prevailing market price has been utilized as the determinant of just compensation, without reference to the owner's individual circumstances, such as his costs or profit. *United States* v. *New River Collieries Co.*, 262

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pepper in May 1944, if it had desired to do so (Br. 12, 41): (1) the export ceiling price; (2) the single-bag ceiling; (3) the price for synthetic or imitation pepper; and (4) the price for ground black pepper. In Point II, we show why these other ceilings—which Commodities artificially has injected into the case—cannot properly be used in determining just compensation here. *Infra*, pp. 110–115.

[29] It is nowhere suggested that the ceiling price was set with a view to establishing the price for government requisitioning, rather than to the needs of private trading. Cf. *United States* v. *Felin & Co.*, 334 U. S. 624, 646; R. 29.

U. S. 341; *L. Vogelstein & Co.* v. *United States*, 262 U. S. 337.[30]

The *Vogelstein* case—which some members of the Court have recently indicated as "closely approach[ing] the situation" presented when a market exists at the ceiling price (*United States* v. *Felin & Co.*, 334 U. S. 624, 645)—shows that a market value based on a controlled price can properly be used. In that case, the measure of just compensation approved for some 12,500,000 pounds of copper requisitioned from the company was the price fixed in an agreement which had been made between the War Industries Board and representatives of the copper producers and copper interests (including Vogelstein), and approved by the President. During the period in which this copper was taken, about 283,000,000 pounds were furnished to the United States at the fixed price, and the Vogelstein Company itself sold some 25,000,000 pounds to the Government at that sum. The fixed price was therefore held to constitute the market price, and the correct measure of the award.

[30] "Where there have been recent actual sales of substantially similar property, market value can be ascertained from an observation of those sales. It is unnecessary to go behind the scenes and inquire what influenced the buyers in paying the prices that they did." Hale, *Valuation in Condemnation Cases* (1931), 31 Col. L. Rev. 1, 2; Marcus, *The Taking and Destruction of Property under a Defense and War Program* (1942), 27 Cornell L. Q. 476, 529.

The significance of *Vogelstein* is that the actual trading in copper furnished the test proving that the controlled price was fair and reasonable, even though the particular company could show that its own costs exceeded that price (262 U. S. at 340). Similarly, here we have a ceiling price which was equivalent, at its inception, to the free market price, and thereafter it formed the basis for a very substantial body of trading for a considerable period. As in the World War I case, the ceiling price should be accepted, even though Commodities may show such "special circumstances" as that its costs are higher, or that it would have retained the pepper for higher prices. Vogelstein's costs were disregarded, as was its ability to keep its copper—as nonperishable as pepper—for many years. (On the owner's ability to keep his goods until after the war as entering into just compensation determinations, see also *infra*, pp. 67–88).[31]

[31] There are, of course, situations where it is said that just compensation is measured by market value, but where there is no actual market. Perhaps the commonest example of that situation is the requisition of real estate, where, all too frequently, there is no actual market value, but in subservience to the market value criterion, one is postulated by attempting to ascertain "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Olson* v. *United States*, 292 U. S. 246, 257; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124. In this situation, just compensation is, in reality, often set on an individual

(b) It is true that by the time this pepper was requisitioned in May 1944, trading had ceased, and there was no active market at the time of taking. But the Court of Claims' findings show indisputably that the cessation of trading occurred because, by September 1943, most other holders of pepper had disposed of their stocks at the ceiling, and the remaining supply of the fixed amount of the commodity in the United States was held by relatively few persons—all of whom resolutely refused to make any sales, and at the same time would not attack the price ceiling in the Emergency Court, although it was open to them to show that the maximum was no longer a valid one (*supra,* p. 31). Commodities itself held some 60% of the total American inventory. See *supra,* p. 49.

On these facts, the ending of trading may properly be disregarded, and resort had to the earlier period when substantial buying and selling did occur. The only market value to be considered in eminent domain proceedings is the "*fair* market value" based on "*fair* market conditions" (*New York* v. *Sage,* 239 U. S. 57, 61; *United States* v. *Miller,* 317 U. S. 369, 374–375; *United States* v. *Cors,* 337 U. S. 325, 332) (italics supplied), and it does not lie in the mouth of

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basis, and it may be that in such circumstances a ceiling price or a maximum rent fixed on general, rather than individual, standards might not, in itself, afford just compensation. Cf. *Bowles* v. *Willingham,* 321 U. S. 503, 517.

an owner holding 60% of the total supply, whose refusal to trade destroyed the market, to insist that the courts blind themselves to the active market constituted by owners willing to sell and purchasers willing to buy. Just as "strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case" (*United States* v. *Miller, supra,* at 375), so the death of the market brought about in this way must "in fairness" be disregarded in a condemnation case.

3. *The administrative determination of the fairness of the ceiling price as applied to Commodities.*—In addition to the proof afforded by the large-scale trading in pepper at the ceiling price, there was, in March 1944, an express administrative determination that the established maximum was not only fair and equitable in general, but also fair and equitable to Commodities. On October 4, 1943, the first formal challenge against the pepper price ceiling was filed, and it was by Commodities (R. 35–37). In its request for an amendment to the regulation, it did not question the fairness of the 6.5 cent basic price; instead, it merely requested the addition of a provision allowing persons who sold pepper ex warehouse to add storage charges computed at the rate of $\frac{1}{24}$ cent per pound per month "for the average number of months beyond one month during which the pepper held by the seller at the date

of this amendment shall have been owned and stored by him." (R. 19–20, 36).[32]

(a) The Price Administrator denied Commodities' request because he found that, even without that additional provision, the ceiling price allowed Commodities a profit substantially in excess of the normal profit in the trade (R. 36–37). He also specifically determined that the general price ceiling should in all fairness be applied to Commodities (R. 37). In the letter rejecting the application, it was pointed out that evaluation of Commodities' inventory on a "first in, first out"[33] basis showed that its average cost on February 3, 1942, when Revised Maximum Price Schedule No. 52 went into effect, was 5.5156 cent per pound, and sales of its inventory at that time, at the ceiling price of 6.50 cents plus permissible charges, or 6.63 cents, would have afforded it a gross margin of profit of 20.35 per cent (R. 37). In addition, the Price Administrator pointed out that had the inventory been sold on October 4, 1943, the date of the petition for an amendment, the additional carrying charge of .6232 cents per pound would have reduced Commodities' gross margin of profit by 8.13 per cent to 12.23 per cent. Net profit for ceiling sales on February 3, 1942, would have been almost 17%, and on October 4, 1943, it would have

[32] The price schedule permitted the addition of storage for not more than 30 days. See *supra*, p. 47.

[33] The Price Administrator's evaluation assumed that Commodities' inventory consisted solely of its most recent purchases. For a description of this method, see R. 110–111.

been 7.5%. Since "the trade reports that a reasonable profit is 10 per cent, the ceiling price established on February 3, 1942, appears as fair and equitable to you" (R. 37). The letter further noted (R. 37):

> Of course, you held your pepper following the original issuance of the regulation fully recognizing the fact that the regulation did not provide for further carrying charges. Grinders have been ready to purchase since the issuance of the regulation. Under all these circumstances it has been determined that it would be unfair to give you the increase in maximum prices which you request.[34]

(b) In this suit, Commodities seems to insist that the ceiling price was neither generally fair and equitable nor fair and equitable to it, despite both the failure to seek court review and the Price Administrator's specific finding. (See, especially, Commodities Br., pp. 10, 21–23). It presents some seven reasons why the 5.63 ceiling was unfair, but six of these are complaints which any pepperholder could have made, and which, if they have any bearing at all, go to the general fairness of the price ceiling, *i. e.* the Indian market (Commodities Br., pp. 11, 46–48); the ceiling price

[34] The denial of this petition for amendment was apparently not reviewable by the Emergency Court of Appeals (O. P. A. Revised Procedural Regulation No. 1, sec. 1300.20, 7 Fed. Reg. 8962), though, as stated above (*supra*, p. 31), Commodities could attack the price ceiling itself as no longer valid.

for imitation black pepper (Br., pp. 9–10, 42, 57–58); the cyclical theory of pepper prices (Br., pp. 48–53); post-war replacement cost (Br., pp. 6, 35–40, 53–57); the price obtainable after control (Pet. 3; Br., pp. 35–40, 53–57); and the post-war price as anticipated in May 1944 (Br., pp. 5–6, 35–40, 53–57). Since neither Commodities nor any other holder of the spice saw fit to go to the Emergency Court, Commodities is not free to say that the price regulation was not generally fair and equitable, and its objections on that score should not be considered. *Supra,* pp. 31–36. And the general trading in 1942 and 1943 furnishes additional validation of the fairness and reasonableness of the ceiling price, without further detailed proof, as we have just urged (*supra,* pp. 45–57). However, in Point II we discuss most of these specific contentions on their merits, and show (a) that they do not justify Commodities' claim that it is entitled to more than the 15 cents per pound awarded by the lower court, and also (b) that they do not impeach our claim that the ceiling price is a sufficient measure of compensation. *Infra,* pp. 92–116. Moreover, three or four of these seven arguments are merely varying formulations of the conception of "retention value" which we shall urge has no place in a requisition for war purposes. *Infra,* pp. 67–88.[35]

[35] The fact that the ceiling price was raised to 10 cents later in 1944, and then to 16 cents, in order to induce Commodities to part with its stocks, does not indicate, of course, that the

(c) The one complaint which does possibly bear on the particular application of the maximum price to Commodities—in its relation to the present taking—is the charge that the cost of the requisitioned pepper was higher than as found by the Administrator (*supra*, p. 58), or even as determined by the Court of Claims (R. 21–22). Above, we have argued that because of the active and substantial market in pepper, as well as the conditions under which the ceiling price was established, Commodities' own costs are immaterial. *Supra*, pp. 53–57. In any event, Commodities' argument as to its costs is erroneous, because its claim of higher costs largely stems from the facts that it itself chose the high-cost pepper (rather than the lower-cost pepper in its stock) to give to the Government on requisition, and it elected to retain its high-cost supplies as long as it could. Commodities had purchased pepper from 1933 until the onset of the war and its purchases had been at prices ranging from a high of eleven cents a pound in 1934 to a low of 3.8 cents a pound in 1939 (R. 66–68). At the time of the requisition, Commodities had on hand, and separately identifiable, both high-cost and low-cost pepper. In complying with the War Department's requisition, the determination as to what

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6.63 ceiling was not generally fair and equitable, or fair and equitable to Commodities, in May 1944, when the instant requisition was made. For the circumstances in which the ceiling price was later raised, see *supra*, pp. 9–10, 50–51; *infra*, pp. 106–108.

pepper to deliver to the Government was made by Commodities itself, and it delivered the high-cost pepper bought between 1933 and 1936 (R. 94, 21); see *supra,* p. 11. As a result, the court below, by adopting Commodities' figures in regard to the actual bags of pepper requisitioned, greatly inflated the costs in its favor.

Moreover, not only was the pepper delivered high-cost pepper but it had been held in storage by Commodities the longest of all peppers owned by it, awaiting the time when the spice could be disposed of profitably. As a result, the various additional costs—such as storage, insurance, taxes, interest and general administration-expenses—which the Court of Claims included in computing the cost, were all disproportionately high, in comparison with the similar costs incurred in connection with the more recently purchased pepper.

If, instead of using these extremely favorable (to Commodities) figures, the court below had used average costs, as it would have been reasonable to do since pepper is fungible, or, even more realistically, had computed costs on the "first in, first out" basis used by the Price Administrator in his evaluation of the fairness of the price ceiling as applied to Commodities, the computed costs would have been substantially lower. See *supra,* p. 58.[36] The Court of Claims,

[36] As indicated above, Commodities began purchasing pepper in 1933, and was apparently buying and selling dur-

by using the figures of the cost of the particular bags requisitioned, in effect required the Government to reimburse Commodities for its long past errors in judgment in buying relatively high-cost pepper in 1933, 1934, and 1935 (see *infra*, p. 97). It is impossible to see how Commodities can validly claim that the "cost of the pepper" justified an allowance of more than 20 cents a pound (*infra*, pp. 99–102), or that, because of its costs, the ceiling price was unfair as applied to the present taking.[37]

4. *Commodities' near-monopoly of pepper.*— Finally, it should not be forgotten, in testing the fairness of the application of the price ceiling in this case, that Commodities made itself a near-monopolist of pepper by refusing to sell any of its supply while others were disposing of theirs. At the outset of the war, we were cut off from our foreign sources for pepper and by the time of this requisition not only was pepper extremely scarce but it was concentrated in r latively few holdings, with Commodities having 60% of the told stockpile. *Supra*, pp. 48–50. Had the market

ing the period from 1933 to 1942. Its highest inventory was in the neighborhood of 25,000,000 pounds in 1938; on December 7, 1941, it held about 21,000,000 pounds, 4,000,000 pounds of which had been sold for future delivery and was delivered in the early months of 1942 (R. 14). Since Commodities seems to claim that the average cost of all pepper held by it in May 1944 was high (Br. 16), it is apparent that it must have selected the lower-cost pepper to use in its voluntary sales prior to 1944. See R. 110–111 and Tr. 287–290 (transcript of testimony in Court of Claims).

[37] On Commodities' cost argument, see also *infra*, pp. 99–102.

not been controlled, Commodities, by virtue of its near-monopoly of the domestic pepper supply, would have been in a position to dictate the terms and conditions under which it would sell its pepper. Because of this near-monopoly power in Commodities—a power to exploit for its own interests the calamity which had befallen the nation—the case closely parallels the situation discussed in the colloquy from the hearings held before the first Advisory Board on Just Compensation (for merchant vessels) set out in the dissenting opinion in *United States* v. *Cors*, 337 U. S. 325, 341, fn. 3.[38]

[38] "Judge HAND. It comes to this, that a society which foresees a shortage, a consequent shortage in one kind of supply, must either proceed at once to seize, or must subject itself and society at large to the disadvantage which comes from the shortage. But when the shortage comes, it may not say 'So far, and no further. We leave the property in your hands for use, but we are helpless to prevent your further exploitation of society by your special interest.'

"Is that your position?

"Mr. MCINNIS. I think, your Honor, that that is the logical implication of my argument.

"Judge HAND. It does seem to me, if it is all perfectly clearly known in advance, to put a society in a rather helpless position as against a small group that has control of all of one vital commodity. You can imagine cases where that would work a result that no one would support. You can imagine the destruction of a large part of food in a community where there was no immediate relief, and, as I understand your argument, they either have to take it now, or when they would find it more convenient to take it they should have to submit to the increase in value, however clearly the owners were advised at a given point, 'This marks the end of that kind of profit—scarcity profit.'

Judge Hand's hypothetical emerges into reality:—When the world war came to the Far East, and the Japanese began their rapid advances in December 1941, it was foreseen that this country would be barred from importing much more pepper, and would probably have to rely on its existing stocks for the duration of the war; by February 1942, this forecast was even more plainly outlined. To prevent exploitation of the community by those fortunately possessed of the newly-scarce commodity, price ceilings were imposed—price ceilings which were based on the free market price and which were generally fair and equitable—and the owners of pepper were thus advised that they would not be able to reap any increase in value stemming from the scarcity. What Commodities asks is that the price-ceiling barrier to such an increment in value be disregarded, and that it be allowed to secure all or part of the increase flowing from its special position.

But, as Judge Hand appeared to suggest, and as Judge Hutcheson, after further discussion with counsel, stated more explicitly,[39] a value-increase

"Mr. McInnis. I think that is correct, Judge. But I would agree——

"Judge Hand (interposing). It might be that the Constitution protects that kind of profit. I won't say now." (1 Report of Proceedings of the Advisory Board, 134–135 (United States Maritime Commission, War Shipping Administration, mimeographed, 1943).)

[39] "Judge Hutcheson. The way to determine Judge Hand's suppositious case is by saying that if a calamity had

coming about through the interaction of the community's emergency and the owner's monopoly would be a "calamity value and not a just value," a "hold-up value" which would be unprotected by the Constitution, and not a fair market value. It is, indeed, difficult to believe that there is anything in the Fifth Amendment requiring the inclusion of such "hold-up value" as an element of just compensation. Cf. *United States* v. *Cors*, 337 U. S. 325, 333–334; *Lord Mfg. Co.* v. *United States*, 84 F. Supp. 748, 755–756 (C. Cls.).[40]

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brought about a tremendous scarcity, the value then fixed would not be the just and fair value of that piece of property, because it would be a calamity value and not a just value. It doesn't mean that the citizen will get what is unjust, or that the Government will pay what is unjust.

"I thought he said: Here is a situation where some calamity destroyed nearly everything you have got in a community, and the prices which somebody might put in the face of that calamity would be regarded as the market price.

"Mr. McInnis. I didn't intend to agree to that. I didn't understand his illustration to be that way, but if that were intended, then I do not agree to that extent. I think that is what I would call a hold-up value, and not based on the general market value.

"Judge Hand. That is." (1 Report of Proceedings of the Advisory Board, pp. 136–137 (United States Maritime Commission, War Shipping Administration, mimeographed ed., 1943).)

[40] The *Lord* case likewise involved a just compensation claimant who was a near-monopolist, and whose products were necessary for the war effort. His demand for his pre-war commercial prices (which he contended represented his product's market value) was rejected in favor of the Army and Navy's administrative award which allowed him cost plus 10%. For pertinent quotations from the Court of

D. POSTWAR "RETENTION VALUE" SHOULD BE EXCLUDED FROM CONSIDERATION IN JUST COMPENSATION DETERMINATIONS FOR WAR TAKINGS

As we read the Court of Claims' opinion (R. 23–28), it did not refuse to consider the maximum price as controlling because it was a legally-imposed ceiling, or because a "free" market did not exist in wartime. (*Supra*, pp. 36–41). Rather, the court below based its rejection of the ceiling price solely on the fact that the property involved here was non-perishable and could be retained by the owner until after wartime controls were removed. It insisted that there are many instances where the owner can keep his property until the lifting of controls, and he is constitutionally entitled to have the award take into consideration "his right to hold his property until he can get for it whatever anyone is willing to pay" (R. 25), *i. e.*, "the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed" (R. 27).[41] But this so-called "retention value" is subject to so many grave

Claims' recent opinion (handed down July 11, 1949) see fn. 53, *infra*, pp. 83–84.

[41] As bearing on the view of the Court of Claims that so-called "retention value" is the reason why price-ceilings are improper measures of just compensation, see *Fabrica Uruguaya de Neumaticos, S. A.* v. *United States*, C. Cls. No. 46486, decided July 11, 1949, 84 F. Supp. 745, 747; cf. *Illinois Pure Aluminum Co.* v. *United States*, 107 C. Cls. 1, 19–20, certiorari denied, 330 U. S. 843.

objections, both practical and ethical, that it should be rejected in just compensation determinations for war requisitions, where a valid price ceiling has been established.[42]

1. *"Retention value" is too speculative.*—In the first place, just compensation is to be determined at the time of taking, and not at some later date (*Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306; *L. Vogelstein & Co.* v. *United States,* 262 U. S. 337; *United States* v. *New River Collieries Co.,* 262 U. S. 341; *Olson* v. *United States,* 292 U. S. 246), and a wartime evaluation of post-war conditions and post-war prices—as they will affect a given commodity or property—necessarily rests on a peculiarly tenuous type of speculation which is unacceptable as a basis for decision. The duration of the war is unknown; even the matter of ultimate victory or defeat is still at hazard. No one can foretell, with any pretense at approximate accuracy, how long price ceilings or other controls will be retained; the owner may find it desirable or necessary to sell his goods before ceilings are lifted;[43] and the course of prices and the nature of general economic conditions, once the market is "free" again, lies in the domain of inspired prophecy rather than of fact-

[42] None of the previous Court of Claims cases cited by the court below at R. 25 involved a maximum price.

[43] For instance, in this case, many holders of smaller lots of pepper sold at the ceiling price rather than hold the pepper indefinitely and incur the cost of holding (R. 16). See *infra,* p. 76.

oriented judgment.[44] General experience with economic forecasting, especially in a period of great flux, does not justify an attempt by courts, required to make evaluations as of the midst of a war, to foretell market or business conditions several years in the future, or in relying on others who claim that gift. Cf. *New York* v. *Sage*, 239 U. S. 57, 61.[45]

2. *"Retention value" is normally rejected in eminent domain.*—Secondly, the owner's right to hold his property until better prices can be had does not ordinarily prevent an eminent domain determination from being made on the basis of prices current at the time of taking. If this pepper, for instance, had been seized on December 10, 1941, no one would doubt that an award of

[44] In its recent *Neumaticos* opinion (fn. 41, *supra*), the court below recognizes that "retention value" is "an intangible value, incapable of anything like exact measurement. * * * It influences value, but affords but a poor guide by which to measure it." 84 F. Supp. at 747.

[45] In the case at bar, a judgment (as of May 1944) as to the price Commodities could get "after restrictions had been removed" would depend—in addition to the general factors mentioned above—on knowledge of what had happened to the pepper vines in the Far East under the Japanese occupation, and there was no near-accurate means of knowing this in 1944. According to the Japanese propaganda, the natives were continuing their plantings of new vines (R. 102). If true, these plantings, plus the stockpile which would have accumulated during the war, would have led to a depressed rather than an inflated post-war price. See *infra*, pp. 96–97. In addition, this pepper was taken on May 26, 1944, before the invasion of France or the battle of the Bulge, and, of course, long before the events over Hiroshima and Nagasaki.

6.75 cents per pound (the then "fair market price") would be proper (R. 16), even though Commodities strongly desired and intended to retain its pepper to reap the anticipated higher prices of the future. "Retention value" would then have been wholly disregarded. Similarly, one whose property is taken in a period of depression does not get increased compensation (under the majority rule) because he would have refused to make a voluntary sale at that time, and would have waited for higher prices. *Alishausky* v. *MacDonald*, 117 Conn. 138, 141–142; Orgel, *Valuation Under the Law of Eminent Domain* (1936), sec. 23.[46]

The reason for this generally accepted rule is not that the owner could replace the requisitioned property at the current market price, and thus keep his previous position unchanged. Frequently that assumption is simply not true, as, for example, if the Government had seized a very large portion of Commodities' pepper early in December 1941, or as in *Vogelstein & Co.* v. *United*

[46] In *United States* v. *Delano Park Homes, Inc.*, 146 F. 2d 473, 474 (*supra*, pp. 37–38), the Second Circuit said that it would be unjust to allow an owner, who could hold his property until the market recovers, the prices current when "the market is upset by temporary variations of supply or demand"; but it seems clear that the court was referring, not to a relatively prolonged depression, but to a "temporary depression and stringency of the money market" of short duration, such as existed in *United States* v. *Inlots*, Fed. Cas. No. 15,441a (C. C. S. D. Ohio), 26 Fed. Cas., at pp. 490, 494–495, affirmed *sub nom. Kohl* v. *United States*, 91 U. S. 367.

States, 262 U. S. 337, where the owner of the requisitioned copper clearly could not replace it at the price held by the Court to be just compensation.[47] The true reason seems to us to be that the existence of actual dealings between willing buyers and sellers, leading to a real market value, validates that current price as generally fair, just, and reasonable—regardless of the particular owner's desires or intentions—and therefore sanctions its use as a measure of just compensation. Where lawful wartime price ceilings have been imposed, we have another method of validating the current price as generally fair and equitable (*supra,* pp. 30–34), and, in accordance with the rule in the more familiar instances cited above, asserted "retention value" should be disregarded. See also *supra,* pp. 53–59.

3. *Inclusion of "retention value" is unfair to the public and other traders.*—Above all, "retention value", even if it could be adequately measured, should be rejected because in wartime it is not fair or just to the public and to other traders to take it into account, and it is far from unfair or unjust to the owner to exclude it from consideration. For this reason, even if it be

[47] The opinion of Mr. Justice Frankfurter in *United States v. Felin & Co.*, 334 U. S. 624 indicates that if the Government had requisitioned the meat products in that case from Felin's customers "there would have been no question that the ceiling prices would have been the measure of just compensation," (334 U. S., at p. 631, n. 4)—but it seems quite unlikely that these customers would have been able to replace the requisitioned goods at the ceiling price.

viewed as a real element of "value", it is one for which no compensation should be made. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 156–8.

(a). The excess over the ceiling price added by such "retention value" would normally be the anticipated increment due to a war-caused post-war inflationary rise. Disruption of production, severe shortages, unfulfilled demands, market dislocations, and scarcities of all types, dam up cumulatively during the war, and break out after the removal or slackening of controls in market surges of which the owner anticipates taking full advantage. But it is not fair to the Government to require it to compensate an owner for such an increment of value directly attributable to the special conditions of production and distribution which necessarily accompany a great war, any more than it is fair that the Government be required to pay, where the wartime market is uncontrolled, the enhanced price which its demand alone has created. *United States* v. *Cors*, 337 U. S. 325, 333.

Just as an uncontrolled wartime market may be "an unfair indication of value" because, among other things, it reflects the Government's special need for an article or commodity,[48] so we think that a potential post-war

[48] Compare the remarks of Bernard M. Baruch, in his 1921 Report as Chairman of the War Industries Board (*American Industry in the War*, 1941 ed. p. 79) :—"In the war, market value was largely created by the Government's emergency, and hence it was not a fair test of just compensation"; and see the opinion of Mack, C. J., in *The Cushing*, 285 Fed. 617.

market, higher than the ceiling price because of the stresses and shortages due to the war, should be excluded from consideration. The increased value flows from the common emergency, the common disaster, and the common effort, and, in the case of a taking for war purposes, the Government should not be forced to allow the owner to take an individual benefit from this war-created value, at the general expense. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 157; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5. Private persons might be willing to pay these higher prices in the post war years, but a dominant purpose of the requisitioning power is to enable the Government to obtain needed goods, at reasonable prices uninfluenced by unfair elements of value, from a recalcitrant owner who would prefer to wait and obtain the expected higher amounts from others. Cf. I Bonbright, *The Valuation of Property* (1937) 408; see *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309; *Lichter* v. *United States*, 334 U. S. 742, 754, 756.

It is a portion of this war-caused value-increase which Commodities demands, and which the Court of Claims gave to it in lesser sum. The war brought about the scarcity of pepper in

618–619 (S. D. N. Y.), reversed, 292 Fed. 560 (C. A. 2), affirmed *sub nom. Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, on the nature and fairness of the World War I uncontrolled ship market, stressing the necessity of testing the market price against the ultimate criterion of fairness under the circumstances.

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the United States, the concentration of holdings in the hands of Commodities and its fellows, the destruction of the pepper vines in the Far East, and the sharp reduction in the production of the spice during and after the war years. And it is precisely these factors which have caused the rise in the price of pepper and which Commodities insists made it reasonably expectable in May 1944 that the price would soar once controls were removed. (See Commodities Br., pp. 11, 53–57, 60–62.)

Significantly, Commodities refuses to acknowledge the nature of the "retention value" it demands, and disguises its claim as a right to wait for a "fair" or "normal" price (Br., pp. 23, 53). But, as we have shown, the maximum price must be accepted as a fair and equitable one in May 1944 (*supra*, pp. 30–34, 45–57), and particularly with this commodity, it is impossible to eliminate the enormous impact of the war and to hypothesize a "normal", non-war-connected, price. The war had its drastic effect, and there was, and could be, no return to pre-war "normal conditions". The real basis for the claim to "retention value" is that there is a constitutional right—which we deny—to get more than the currently fair and equitable price in wartime because the commodity can be held until prices go higher. And even more significant than the terms in which the claim is clothed is the fact that Commodities does not demand, and the lower court did not grant, the

full war-caused increment, even though their reasons for making a partial award would inevitably compel allowance of the entire amount. This abstinence shows, we think, the uneasiness infecting a claim that an owner is constitutionally free in wartime to take advantage of post-war war-caused price rises, and strongly suggests that such a claim is not within the common understanding of what is fair and just.

Even if the owner could demonstrate conclusively that the anticipated post-ceiling increment is non-war-caused in the sense that it flows from the normal workings of the economic system which *actually* continued to operate during the war period—rather than from the intervention of war conditions—fairness would not require the increment to be allowed over and above a ceiling price which concededly is fair and equitable in general, and is also probably fair and equitable to the particular claimant. As we show below (*infra*, pp. 77–78; see also *supra*, pp. 36–41), the loss of that additional element of "value" is closely akin to the many uncompensated depreciations or reductions in property values which accompany a war (*Bowles* v. *Willingham*, 321 U. S. 503, 517–519), and in our view, justice does not require singling out the owner of requisitioned property for reimbursement of this type of tangential value-increment.[49]

[49] Commodities attempts to place the increment it claims within this class of non-war-connected increases in value, but

(b). Furthermore, giving effect to "retention value"—assuming that the claimant can prove it exists—constitutes an unfair discrimination against those traders or property owners who do not have, or cannot show that they have, the resources to enable them to out-wait the war and its system of controls. Unlike Commodities, few traders are in the financial position to incur the costs of freezing their inventory for the indefinite period of a war, on the gamble that at the end of that period they would be able to dispose of it profitably. See *Supra,* p. 68, also fn. 43, p. 68. Indeed, it was apparently because of this pressure that many traders in pepper sold their stock at the ceiling price, for, as the court below found, "* * * traders in pepper, importers, and grinders, particularly those who held smaller lots [sold their pepper] because they realized it would be impossible for them to obtain a greater price than the ceiling, and therefore they sold rather than hold the pepper indefinitely and incur the cost of holding" (R. 16).

To take account of potential post-war markets, in requisition proceedings, is thus to compensate

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we show below that the alleged increment does not fall in this category (*infra*, pp. 93–99), and the Court of Claims apparently did not so regard it. Commodities' argument is really based on a hypothetical construction of what would have happened to pepper and pepper prices, *if there had been no war*, rather than on proof that the alleged normal workings of pepper-growing and the pepper trade actually continued to operate while the war was going on. This, of course, is not a true test of "retention value" at all.

the well-placed owner primarily for being able to withstand the pressures of the wartime economy. His weaker brother, who would have submitted to the economic compulsion to sell at the ceiling, cannot, of course, prove that he would have kept the goods, and therefore cannot claim compensation for "retention value," any more than the owner of a perishable commodity could do. Cf. *United States v. Felin & Co.*, 334 U. S. 624, 645–646; R. 24–25 (opinion of Court of Claims).[50] But the ability of the strong to withstand the pressures of the wartime economy does not seem a fairly compensable item or element of value.

4. *Exclusion of "retention value" is not unfair to the owner.*—Certainly, in the conditions of wartime life, the owner cannot rightly charge unfairness against the exclusion of "retention value." The deprivation he suffers, if there be any at all, is wholly comparable to, and no greater than, the non-compensable losses endured by many seg-

[50] We urge above that—disregarding the matter of "retention value,"—there is no objection to using the ceiling price as the measure of just compensation. *Supra*, pp. 34–41. In the *Felin* case, *supra*, four justices appear to have agreed, in a case involving what was regarded as a perishable commodity without "retention value," that the ceiling price is the proper measure (334 U. S. at 642–649); three justices did not reach that issue (334 U. S., at 625–642); and two justices thought the ceiling price should not be the measure. 334 U. S. at 650–653. (The products requisitioned in *Felin* were largely cured pork products; they were in fact probably not perishable and could have been kept, under proper refrigeration, for a substantial period of time.)

ments of the nation, as a result of the total mobilization of effort, manpower, and of property required to win the war. Cf. *Lichter* v. *United States,* 334 U. S. 742, 755–765, 767.

(a). Allocations and priorities systems were devised to distribute scarce materials and products of all kinds among competing military and civilian demands and to insure the prompt, efficient, and adequate flow of short materials to the armed forces, to our allies, and to the home front. In order to attain these objectives, it was often imperative to withdraw or revise allocations granted, or to reallocate because of a changed military situation or a change in legitimate consumer demands. See Brief for Respondents in *Steuart & Bro.* v. *Bowles,* No. 793, Oct. Term, 1943, pp. 18–21. As a result, many business enterprises were deprived of the materials they needed for the conduct of their operations, with the result that many had to curtail and even cease operations. Notwithstanding these consequences, these systems were undoubtedly constitutional (cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398), and although the losses suffered frequently were very substantial, such damages were only incidental to the overall objective of so organizing our economy as to enable the United States to wage war successfully. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815.[51]

[51] Any financial losses which ensued were "damnum absque injuria * * * private interest has merely come into colli-

As pointed out in *Steuart & Bro.* v. *Bowles*, *supra* at 405:

> That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action might be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business.

In addition, the Government simultaneously was endeavoring to prevent inflation by means of price ceilings imposed on every commodity bought and sold within the national boundaries (*Yakus* v. *United States*, 321 U. S. 414), as well as the amount of rent to be charged for every room, home, or building (*Bowles* v. *Willingham*, 321 U. S. 503). The fact that the imposition of these price ceilings reduced the value of the property regulated was expressly rejected by the Court as an obstacle to the Act's constitutionality (*Bowles* v. *Willingham*, 321 U. S. at 517–518). The Court further noted (p. 519):

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sion with a public interest, and has had to yield." *Brown* v. *Wilemon*, 139 F. 2d 730, 732 (C. A. 5), certiorari denied, 322 U. S. 748; see, also, *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C. A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States*, 143 F. 2d 222 (C. A. 5), certiorari denied, 323 U. S. 749.

> A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.

Various controls and restrictions were likewise placed on the upward movement of wages; there were limitations on the right to strike, and on the freedom of collective bargaining; manpower regulations were instituted. See *A Symposium On Labor Law in War Time* (1944) 29 Ia. Law Rev. 145 *et seq.*

Also, Congress by the Renegotiation Acts and the Royalty Adjustment Act was attempting to limit war profits. See Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245, as amended, 50 U. S. C. App. 1191 (Renegotiation Act); Act of October 31, 1942, 56 Stat. 1013, 35 U. S. C. (1940 ed.) Supp. V, 89–96 (Royalty Adjustment Act). The power to control these profits had been explicitly affirmed in *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309. And the Renegotiation Acts were sustained in *Lichter* v. *United States*, 334 U. S. 742, with the statement (334 U. S. at 756):

> The conscription of manpower is a more vital interference with the life, liberty and property of the individual than is the conscription of his property or his profits or any substitute for such conscription of

> them. For his hazardous, full-time service in the armed forces a soldier is paid whatever the Government deems to be a fair but modest compensation. Comparatively speaking, the manufacturer of war goods undergoes no such hazard to his personal safety as does a front-line soldier and yet the Renegotiation Act gives him far better assurance of a reasonable return for his wartime services than the Selective Service Act and all its related legislation give to the men in the armed forces. The constitutionality of the conscription of manpower for military service is beyond question. The constitutional power of Congress to support the armed forces with equipment and supplies is no less clear and sweeping. It is valid, *a fortiori*.

See, also, *United States* v. *Bethlehem Steel Corp., supra,* at 305 (under the war power, "Congress can draft men for battle service * * *. Its power to draft business organizations to support the fighting men who risk their lives can be no less"); cf. *Coffman* v. *Federal Laboratories,* 171 F. 2d 94 (C. A. 3), certiorari denied, 336 U. S. 913.

At the same time, the Government was conscripting, without reference to compensation, millions of citizens for service in the armed services, divorcing them from their normal pursuits, separating them from their families, and exposing them to the hardship and hazards of combat, including possible injury and loss of life. *Falbo* v.

United States, 320 U. S. 549; *Selective Draft Law Cases*, 245 U. S. 366; cf. *Commers* v. *United States*, 159 F. 2d 248 (C. A. 9), certiorari denied, 331 U. S. 807.[52]

Each of these systems of regulation or control frequently imposed serious deprivations, hardship, or reduction in property values on those subject to their reach, but these losses had to be borne without compensation, as part of the national war effort. Since "just compensation" cannot be blind to the realities of wartime life and still remain fair and equitable, we believe that the limitations imposed upon conscripted manpower and upon war workers, and the various restrictions on the use of property which often led to substantial uncompensated losses as well as reduced earnings to its owners—all for the purpose of enabling the nation successfully to defend itself and its people from foreign aggression—should be considered in determining the measure of compensation for war takings. It seems to us hardly less

[52] In order to further the successful prosecution of the war, this Court has also sanctioned the restriction of the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214), the restriction of freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States*, 249 U. S. 47), the prohibition of the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146), and the Government operation of the railroads (*Northern Pacific Railway Company* v. *North Dakota*, 250 U. S. 135).

than substantial justice to everyone, including the property owner, that the measure of just compensation for property requisitioned for use in the defense of the nation—which, of course, includes the owner of the seized property—should normally not exceed the sum which other persons who were selling their property during the war received and could receive, *i. e.*, the constitutionally-established maximum price, which at the very least bears the stamp of being generally fair and equitable. Cf. *Lord Mfg. Co.* v. *United States,* 84 F. Supp. 748, 755–756 (C. Cls.).[53]

[53] In the recent *Lord Mfg. Co.* case (decided July 11, 1949), the Court of Claims upheld contract repricing orders administratively issued by the War and Navy Departments during the war under Title VIII of the Revenue Act of 1943 (58 Stat. 21, 92, secs. 801–802, 50 U. S. C. App. 1192), and in connection with compulsory "orders to produce" issued to the plaintiff, which was almost the sole producer of certain necessary war materials. The court held that the administrative award of cost plus 10.5% constituted just compensation, as against the contractor's claim that he was entitled to his commercial list prices, which would have yielded him a profit of 50 to 100 percent.

The Court of Claims strongly emphasized the close connection between the facts of a wartime emergency, and the determination of just compensation:

"But these were not ordinary times. It requires no description to make Americans realize that everything they had was involved in the undertaking with which they were faced. Plaintiff contends that its list prices represented the market value; that it could have sold all the items which it could produce at the list price or at a higher price, and that this constitutes the measure of just compensation. There are two fallacies in this position. The Fifth Amendment says nothing about market value. It uses the term 'just

In particular, it would not be unfair to deprive the owner of a post-war "retention value" attributable to the very tensions and dislocations of war which imposed comparable or worse deprivations on so many others—through the workings of the manpower, priority, price-fixing, allocation, and profit-limitation requirements. It is in nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices

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compensation.' It is true that frequently market value is the best yardstick for determining just compensation, and is therefore usually applied where there is a free and untrammeled market. But here there was no such market. * * * Many other facts might be recited as contributing during the emergency to the question of what constitutes just compensation, but certainly it would not be fair when the price of food, the wages of labor and the prices of all other materials going into the war effort were being controlled, to permit a market value based on what almost amounted to a monopoly, plus a shortage of material elements, to constitute the measure of just compensation. * * *

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The nation was in great peril—our national life being at stake. People were necessarily attuned to the war effort. Men and women were uncomplainingly permitting themselves to be drafted for all kinds of difficult war jobs. Women and even children were driving tractors in the hot sun to produce and supply the food essential to the world-wide operations of our army and navy and those of our allies. Young men, who had never had a fling at life, were taken from their homes to face hardship and even death on distant fields. Businessmen generally and even plaintiff's competitors were willingly accepting the 10 percent above cost for supplies and equipment needed in the war effort. * * * the doctrine that prices may be based on what the traffic will bear has no place in our national economy at such a time." See, also, fn. 40, *supra*, pp. 66-67.

of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States*, 334 U. S. at 754.[34]

(b). The intrinsic justice of disregarding the war-caused post-war rise in prices, which "retention value" is largely supposed to gauge, is confirmed by certain requisition measures adopted in World War II by others of the democratic combatants which have long followed the principle of awarding just compensation for requisitioned property. The British Compensation (Defence) Act, 1939 (2 & 3 Geo. 6, ch. 75, Sept. 1, 1939) provided in Section 2 (land), 4 (vessels,

[34] Our general position is exemplified in the following colloquy which occurred in the course of the House debates in regard to a proposed amendment to Title VI of the Second War Powers Act which, as enacted, amended the provision of the Requisitioning Act of 1941, here involved:

"Mr. TABER. Does not the gentleman realize that the only reason a man is entitled to any compensation is because it is not considered fair that the man whose property is taken should bear the whole burden? Now, is it any more nearly fair if a man's business is entirely put out as a result of taking something to give him compensation for any one thing?

"Mr. CELLER. I respectfully differ with the gentleman. The man drafted may have his business entirely wiped out. He cannot continue in absentia. He gets no compensation for the destruction of his business or factory. Furthermore, we must adopt two different standards, one in peacetime and one in wartime, and that is the very quintessence of this situation. In wartime we cannot adopt the type of damage involved in the amendment of the gentleman from New York." [88 Cong. Rec. 1778.]

vehicles, and aircraft), and 6 (other goods) that "no account shall be taken of any appreciation in the value thereof due to the emergency." [55] The Canadian Compensation (Defense) Act, 1940 (4 Geo. VI, ch. 28, August 7, 1940), provided that "no account shall be taken of any appreciation in the value thereof [*i. e.*, vessels and aircraft] due to the war." New Zealand's Shipping Requisitioning Emergency Regulations, 1939, Amend-

[55] The British Indemnity Act, 1920 (10 & 11 Geo. 5, ch. 48, August 16, 1920) variously provided that certain compensation claims for the taking of vessels should take account "of the profits which the owner could have made if there had been no war", and not take account of "any increase of market values of tonnage or rates of hire due to the war" (Schedule, Part I); that certain other compensation claims should be assessed on a basis taking account of "the existence of a state of war" (sec. 2 (2) (iii) (a)), and others without including anything "in respect of any loss or damage due simply and solely to the existence of a state of war" (Schedule, Part II).

Also, in World War I, the British Defense of the Realm (Acquisition of Land) Act, 1916 (December 22, 1916), 6 & 7 Geo. 5, ch. 63, provided that in determining the amount of compensation for land compulsorily acquired for war purposes, "the value of the land acquired shall be taken to be the value which the land would have had at the date [of taking] if it had remained in the condition in which it was at the commencement of the present war, without regard to any enhancement or depreciation in the value which may be attributable directly or indirectly to any buildings, works, or improvements, erected, constructed, or made on, over or under the land, or any adjoining or neighbouring land for purposes connected with the present war wholly or partly at the expense of the State, or with the consent of the occupying department, at the expense of any person not being a person interested in the land * * *" (Schedule, par. 6).

ment No. 1 (November 29, 1939), provided that the price to be paid for a vessel, the title of which was requisitioned, "shall be the fair market value thereof at the date of acquisition together with any special value to the owner due to the use made by him of the vessel but excluding any enhancement of value arising from war conditions and their effect on the market, and excluding also any consideration of special value due to the fact that it is a component of a fleet or service" (Statutory Regulations 1939, p. 1004). The Australian "Basis of Compensation Order" (issued under Regulation 60 H of the National Security (General) Regulations) provided that in computing an award for interests in land "no account shall be taken of any appreciation of values due to the war," and, in another connection, excluded "any increase in rental value attributable to the war."[86]

[86] The Australian Basis of Compensation Order was invalidated by the High Court as failing to provide the "just terms" required by section 51 of the Australian Constitution, but the war "enhancement" clause, referred to in the text, was not the ground for the invalidation. *Minister of State for the Army* v. *Dalziel*, 68 C. L. R. 261 (1944); *Minister of State for the Army* v. *Pacific Hotel Pty Ltd.*, noted at 68 C. L. R. 310 (1944). Only two of the five justices discussed the "enhancement" clause (Latham, C. J. and Starke, J., who dissented from the general invalidation of the Order), and both apparently thought it clearly valid. 68 C. L. R. at 293, 310–312. Starke, J., commented: "Again, the direction that no account shall be taken of any appreciation of values due to the war is also, I suppose, a provision to which exception is taken [by counsel for the owner]. *But that kind of provision has been common in Compensation Acts for many*

Article 23 of the French law of July 11, 1938 (concerning wartime requisition, *inter alia*) provided that "* * * the indemnities due as a result of requisition shall be calculated by taking account only of the actual loss which the definitive or temporary dispossession imposes on the prestator [*i. e.*, owner] on the day of requisition, exclusive of the profit which the free disposition of the property might procure him and of any rise in prices produced by speculation or monopoly or any other circumstances imputable to the state of war or of external tension." Journal Officiel, July 13, 1938, p. 8330; Wise, *Requisition in France and Italy* (1944), pp. 13–14, 20, 49–51, 85. [57]

E. ACCEPTANCE OF THE PRICE CEILING WOULD NOT INVADE THE JUDICIAL FUNCTION IN EMINENT DOMAIN PROCEEDINGS

Finally, we believe that no barrier to the acceptance of a valid price ceiling as the measure of just compensation is raised by the principle of *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, that the "measure of compensation * * * is a judicial and not a legislative question."

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years and there is nothing unreasonable or unjust about it." 68 C. L. R. at 293. [Italics supplied.]

[57] A previous French law on the general organization of the nation for time of war contained a similar provision concerning "an increase of prices illicitly brought about by speculation or the cornering of the market or by other circumstances imputable to war." See H. Doc. 163, 72d Cong., 1st sess., pp. 878–879.

Even if that rule be accepted in its full sweep,[58] there is nothing to prevent a court from adopting, in the performance of its judicial function, the price ceilings established under a Congressional enactment because, in the circumstances of wartime, those price ceilings constitute a fair, equitable, and just measure of compensation for war takings. Cf. *United States* v. *Felin & Co.*, 334 U. S. 624. We do not urge that Congress has established, in the Price Control Act, any "rule of compensation" (148 U. S. at 327) which the courts are bound by statute to follow (see fn. 11, *supra*, p. 35), but only that the courts, in determining for themselves the issue of compensation, should adopt the price ceiling as the proper measure. And the *Monongahela* rule certainly does not go so far as to deny the courts power to accept a valid price ceiling, as such, because it was administratively established; the right to a judicial review by the specially-created Emergency Court of Appeals is available (*supra*, p.

[58] In the Government's brief in *United States* v. *Cors*, 337 U. S. 325, Oct. Term, 1948, No. 132, at pp. 41–55, it was urged that if the *Monongahela* case held that Congress was powerless to lay down any legislative rules of compensation for takings, it was erroneous, and that Congress can validly establish measures of just compensation which differ from the accepted judicial standards. The Court found it unnecessary to pass upon this argument. 337 U. S. at 331–2. For the reasons given in the text, we do not believe it necessary to make that argument here, but if it were, we would re-advance the position taken in last term's case.

31), and there is no reason why the compensation court must pass for itself on the issue of the validity of the ceiling or its generally fair and equitable character. Cf. *United States* v. *Jones*, 336 U. S. 641, 669–670 (if suit for railway mail pay is one for just compensation, the Court of Claims can review an I. C. C. order setting the rate of pay, but cannot substitute its own judgment).

On the contrary, the very existence of the *Monongahela* principle furnishes an impetus toward judicial acceptance of the price ceiling as the normal measure of just compensation. For in World War II Congress went far toward doing what it thought it could to take the profits out of war, to keep the war's costs on a fair and reasonable level, and to share them equitably.[59]

[59] Ever since the end of World War I, Congress has been strongly concerned about the high prices charged the Government for all war supplies, the large profits made on munitions or equipment furnished to the nation, particularly the large awards which were made for commandeered property. See, *e. g.*, the studies of the War Policies Commission, H. Docs. 163, 271, 72d Cong., 1st sess. (1931–1932), especially No. 271, pp. 23–25 (high awards for commandeered property); the reports of the Special Senate Committee on Investigation of the Munitions Industry pursuant to S. Res. 206 of the 73d Cong., S. Reps. Nos. 477 and 944 (1935–1936), 74th Cong., especially pt. 2 of No. 944, pp. 3, 111–113 (high awards for requisitioned property); Hearings before the Committee on Military Affairs, H. of Reps., 68th Cong., 1st sess. on H. J. Res. 128, H. R. 194, H. R. 4841 and H. R. 8111 (March 1924) ("Universal Modification for War Purposes"); and Hearings before the Committee on Military Affairs, H. of Reps., 74th Cong., 1st sess. on H. R. 3 and

It enacted the excess profits tax and price-fixing legislation; it provided for contract renegotiation and the readjustment of patent royalties (*supra*, pp. 79–81); and by Section 902 of the Merchant Marine Act of 1936 (49 Stat. 1985, as amended, 46 U. S. C. 1242), it attempted to eliminate some of the war profits resulting from the requisitioning of war-needed vessels. Congress did not, however, make any effort to prescribe comparable rules in the general requisitioning statutes of 1941 and 1942. The reason for this is not that Congress was unconcerned with that facet of the war profits and war-costs problem, but rather that leading legislative sponsors of this legislation indicated that, under the *Monongahela* rule, Congress could not validly lay down any measures of just compensation different from those traditionally applied by the courts (88 Cong. Rec. 1778–1779). Indeed, until recently, there were many who thought the enhancement clause of the Merchant Marine Act's Section 902 was an unconstitutional infringement by the Congress on the judicial function. Thus, control of war profits and costs in connection with wartime requisitions of property is one instance where the Court's admonition that "* * * if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this

H. R. 5293 (January 1935) ("Taking the Profits Out of War").

Court, the power to make them" (*United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309), has been thought in many quarters to be inapplicable. Congress has largely done what it thought it could under the Constitution to control these profits. It has been left up to the courts to close the sole remaining substantial gap in the effort to eliminate this evil.

II

THE FINDINGS OF THE COURT OF CLAIMS DO NOT SUPPORT ITS AWARD OF 15 CENTS PER POUND, AND COMMODITIES IS CERTAINLY NOT ENTITLED TO ANY HIGHER AWARD

In No. 163, Commodities urges that the Court of Claims erred in awarding 15 cents a pound rather than 22 cents. To support this position, it relies on seven factors (Pet. 3; Br. 5–6), and asserts that the court below not only failed to accord proper weight to these factors but also failed in several instances properly to find the facts relating to them. These same factors—and one or two additional—are also apparently called upon to show that the ceiling price does not constitute just compensation. In this Point, we discuss each of these grounds on which Commodities relies; the thread of the argument will be that, (a) as for the factors which the Court of Claims refused to consider at all, its holding was plainly correct, even on the hypothesis that the ceiling price is not decisive; (b) on the same hypothesis,

the Court of Claims gave more than sufficient weight to the factors which it did weigh; and, finally, (c) none of these factors invalidates our major contention that the ceiling price is determinative. We shall also show that the findings of the Court of Claims do not support its award of 15 cents per pound—even on its assumption that the ceiling price was irrelevant—because the factors on which its judgment rests furnish too weak a foundation for evaluating the worth of Commodities' pepper at that sum.

A. THE SO-CALLED NORMAL "CYCLE" OF PEPPER PRICES

The Court of Claims' opinion indicates that it gave some general weight, in unspecified measure, to Commodities' theory that, *in the absence of war,* there would be a fairly constant and therefore predictable movement or cycle of black pepper prices over a span of years, and that the time for high prices would have come in 1944 (R. 25-26, 27). The court's finding on this point is that (R. 22–23):

> The consequent reduction in crop was first noticeable, so far as its effect on prices was cerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942. *If there had been no war in 1941,* it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have

> begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States. [Italics supplied]

(Br. 49)

There is no estimate in either findings or opinion as to what the higher price would have been.

In support of its contention that the court should have considered "the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, *had there been no war*" (Br. 6; italics supplied), Commodities attacks the finding quoted above as not being as strong as the evidence. Although it concedes that no witness actually estimated that price, it claims that the evidence shows that "any reasonable estimate would put the total price above 20¢ in May 1944" (Br. 49).

1. In our view, the hypothetical price which would have prevailed "had there been no war" should have been entirely ruled out. The existence of World War II is an intervening fact which cannot be avoided, because its existence admittedly interfered drastically with the alleged normal workings of the pepper-cycle. The coming of a world war certainly had had that effect before the Indies were invaded; in addition, the Japanese overran Sumatra and Indo-China in the winter and spring of 1941–1942; and Commodities does not contend that normal conditions continued.

As indicated above (p. 93), the Court of Claims' finding on this point does not say that the alleged normal cycle continued despite the war, or attempt to differentiate between the portion of an asserted actual wartime price rise attributable to the workings of the cycle and that due to the war's intervention. The finding is limited to what would have occurred "if there had been no war in 1941," and Commodities' evidence was geared to produce that kind of hypothetical finding.

In Point I, we urge that a theoretical "value" which-would-have-existed-if-there had been no war—of the type Commodities offers here—should not be allowed if it exceeds the ceiling price. *Supra*, pp. 25–88.[50] If our views as to the decisive status of the ceiling price be rejected—because the pepper had "retention value" for which the owner should be compensated—we suggest that this type of speculative construction of a non-existent peaceful span of years, in lieu of the actual war period, is ordinarily a very unsure basis for determining the actual "current" or "retention" value of the requisitioned commodity at the time of taking. See fn. 49, *supra*, pp. 75–76. If it is to be considered at all, it should be with great caution, and only if there is presented some con-

[50] In short, we do not believe that it would be a "travesty upon justice" (Br. 49) for the owner of property requisitioned for war purposes to receive less—because of a wartime price ceiling—than it could have obtained had there been no war. A war changes many lives and alters many values—property and otherwise. *Supra*, pp. 71–88.

vincing evidence as to what the market would have been if there had never been a war.

2. In any case, Commodities' claim that the pepper price in May 1944 would have been over 20¢, according to the cyclical theory of the movement of pepper prices, is unsound, and Commodities' own evidence even indicates that the Court of Claims itself placed entirely too much weight on the theory.

According to the theory, pepper prices over 100 years have moved in regular cycles, and "the length of time between the several tops and the several bottoms was always about 15 years, the life of the pepper plant" (Pet. 62; cf. Br. 49). In line with this theory, the claim is that since "the last top was 40¢ in 1928" "the next top (no war occurring) should have been about fifteen years later or 1943" (Pet. 63).

One major difficulty with applying this theory to forecast the price of pepper in 1944 is that the most recent cycle did not adhere to this alleged 15-year pattern. Commodities' expert, Katz, testified that the last peak was in 1925, 1926, and 1927 (R. 67); that this peak of 40¢ per pound was "the highest price we have reached in fifty or one hundred years or whatever it was, and on account of that production increased so tremendously" (R. 67). As a result of this abnormal peak, the valley of the cycle was not reached by 1933, 1934, 1935, as the theory indicated should have happened. Instead, during that period there

was a rise in prices, with an 11-cent peak reached in 1934, and thereafter the prices steadily declined until they reached a low of 3 cents per pound in June 1939 (R. 68).

Thus, the movement of pepper prices during the 1930's is not explicable under the cycle theory. Mr. Katz further testified that the proponents of the 15-year cycle theory made the mistake, in applying it to prices during the 1930's, of forgetting the abnormality of the 1925-1927 peak (R. 67, 68). Commodities apparently made the same mistake for it began its pepper operations in 1933 (R. 14, at a time when, under the theory, the prices should have hit bottom, whereas at that time they actually rose to a peak in 1934, and only thereafter did they decline to the 1939 low (R. 16).[61]

[61] Commodities' whole argument, on this point, is that the production of pepper in the Dutch East Indies is the only important factor governing pepper prices in New York. But this cannot be so, since a comparison of annual production and prices shows that there is no close correlation. For instance, the prices in 1936 and 1938 were practically the same (R. 16), although the 1936 crop appears to have been about one-third larger than that for 1938. It seems clear (as Commodities' President admitted below) that other factors must affect the price significantly. General world trading conditions are important, and even more dominant is the reserve or stockpile at any given time. The greater the reserve, the greater the depressing effect upon any upward movement of prices steming from reduced imports. And the American inventories of from 78,000,000 to 100,000,000 pounds, in 1942, were very large and undoubtedly would tend to keep down inflationary pressures.

Nor is the increase in price from the 3-cent low of June, 1939, to over 6 cents a pound in December 1941, when the first price ceiling was imposed, purely a normal increase explicable entirely under the cycle theory. The increase in pepper prices in 1939 and 1940 was practically nil; the 1940 average price was only one-tenth of a cent higher than the 1939 price (R. 15). Apparently, although production of pepper was decreasing, the stockpile was sufficiently great to keep prices down. Then, going into 1941, the price jumped from 4.1 cents in January to 4.5 cents in February to 6.2 cents in March, and thereafter continued at about this level (R. 15). But this price increase was attributable not to the normal workings of the cycle but rather to speculators who apparently regarded war in the Far East as fairly imminent and there was a large amount of buying of pepper futures (R. 108–109). It was because of this speculation that the margin requirements were increased substantially in August 1941 (see R. 89–90, 109), and, after the renewal and increases of such speculation on the outbreak of war, the Price Administrator imposed the first pepper ceiling price in December 1941. See *supra*, pp. 4–5, 46.

If this speculative increase due to the war is eliminated, there is no reason to believe that it would not have been as much of a mistake to apply the cycle theory to pepper prices following their abnormal low in June 1939 as it was to follow that theory while prices were supposed to

be declining in the middle 1930's. *Supra*, p. 97. Indeed, when asked "You do not know how far it [the price of pepper] would have gone by May 1944," Mr. Katz, Commodities' main expert witness, responded, "No, sir, that is too much of a guess" (R. 68).[62]

Plainly, therefore, there is no basis for Commodities' claim that the price of pepper in May 1944, absent a war, would have been in excess of 20 cents a pound. And even the lesser reliance which the court below apparently placed in the cyclical theory is likewise unsupported by the evidence. It was impossible to predict with any accuracy what the price of pepper would have been in 1944 if there had been no war.[63]

B. THE COST OF THE REQUISITIONED PEPPER

The Court of Claims found that the cost to Commodities of the requisitioned pepper was 12.7 cents a pound, and considered it as one element in the determination of just compensation, with

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[62] The testimony of Commodities' other expert, William Archibald, Jr., was merely to the effect that he thought that prices would increase in general accordance with the "cycle" but he would not give any figures, and refused to say what the price would have been in May 1944 (R. 87, 81). Contrary to Commodities' statement in its brief (Br. 51), Mr. Archibald expressly refused to state whether or not the price would even have exceeded the so-called "50-year average" of 13½ cents by May 1944 (see transcript of testimony in the Court of Claims, at pp. 231–232).

[63] *A fortiori*, the cyclical theory would be of little or no help in predicting, as of May 1944, what the post-war price of pepper would be. The intervention of the war destroyed whatever predictive value the theory had. See also *infra*, pp. 102–104; *supra*, p. 69, fn. 45.

the comment that the 15-cent value fixed by the court "allows [Commodities] a little more than 2 cents a pound profit" (R. 27).

Commodities challenges this finding as too low (Br. 58–60). It asserts that its costs properly should be "built up" by the inclusion of hypothetical costs to 17½ cents, to which should be added "an allowance for holding and managing the pepper for 9 years" (Br. 59). Thus, Commodities urges that "cost plus a reasonable profit" justifies and requires an allowance in excess of 20 cents per pound (Br. 6, 20, 59). However, whatever error the court below committed as to the costs of the pepper was, we submit, in Commodities' favor.

1. We have already pointed out (*supra*, pp. 61–62), that Commodities itself selected the high-cost pepper which the Government took on this requisition, and that it adopted the policy of retaining its high-cost pepper as long as possible, disposing first of the lower-cost stocks—thus greatly inflating the "cost" of the particular bags of pepper seized by the Government. If more realistic and fairer methods of determining costs are adopted, there is no basis for the claim that the Price Administrator underestimated the cost of Commodities pepper, and certainly none for saying that the Court of Claims' determination was erroneous. *Supra*, pp. 58, 61–63.

2. The addition by the court below of two cents a pound profit to Commodities' costs (R.

27), as well as Commodities' claim that it was entitled to "profit for holding and managing the pepper for 9 years" are erroneous as a matter of law, for it is well established that just compensation requires that the owner be awarded only the value of his property and not a profit on it. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–282; cf. *De Laval Co.* v. *United States,* 284 U. S. 61, 74; *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 523–524.

3. Nor is there any basis for including, as Commodities suggests (Br. 6, 59), hypothetical costs such as interest at a rate higher than that actually paid, and costs for administrative and general services rendered gratuitously by its officers. The Court of Claims' allowance of interest limited to the rate actually paid accords with the requirements of just compensation. *United States ex rel. T. V.* v. *Powelson,* 319 U. S. 266, 285. The other costs are administrative overheads which themselves add little, if anything, to the value of the pepper taken. This situation, therefore, is unlike *United States* v. *Cors,* 337 U. S. 325, 327, 336, relied on by Commodities (Br. 59), for in that case the owner had repaired and improved the vessel, and he claimed that this labor actually enhanced the ship's value materially. At most, these costs are general costs of running Commodities' investment business, and are not compensable in eminent domain proceedings, where only the value of the particular property

taken is to be paid for. Cf. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378; *United States* v. *General Motors Corp.*, 323 U. S. 373, 382; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 11–12.

C. COMMODITIES' CLAIM FOR FURTHER "RETENTION VALUE"

The Court of Claims rested its award of 15 cents per pound, and its rejection of the ceiling price, on an evaluation of the pepper's "retention value" in May 1944 (R. 25–27), and we have urged, in Point I, that it was error to add anything to the ceiling price on that account. *Supra*, pp. 67–88). Commodities contends, however, that the lower court failed to award it the proper sum on account of "retention value," and that the correct award would bring the unit price up to at least 22 cents per pound (Br. 53–57, 60–64).[64]

1. If we are right in our primary argument that the ceiling price controls, Commodities' three grounds for asserting that the pepper's "reten-

[64] Three of Commodities' seven factors (Pet. 3; cf. Br. 5–6) deal with "retention value":

"(b) the price which, in May 1944, it was reasonable to expect would be obtained for Whole Black Pepper at the end of the War, less carrying charges to that time, pepper being non-perishable and easily stored;

"(c) the price which plaintiffs-petitioners could actually have obtained for the pepper at the time of decontrol, less carrying charges from May 1944 to that date;

* * * * *

"(e) the replacement cost—more than 50¢ per pound."

See fn. 65, *infra*, p. 104.

tion value" exceeds that allowed by the Court of Claims likewise must fall. Neither the post-war price which could be expected (in May 1944) to be obtained for the pepper, nor the post-war price which could actually have been obtained, nor the actual post-war replacement cost (see fn. 64) could be considered.

In this connection, it should be noted that a judgment, as of 1944, as to the price Commodities could have gotten "had it been permitted to hold [the pepper] until after restrictions had been removed" (R. 27) was difficult, not only because of the general inability to predict at that time the course and outcome of the war, the duration of controls, or the circumstances of post-war history, but also because the Japanese invasion made it impossible to know the state of pepper-production in the Far East—the factor which Commodities urges as the most important in determining the price of pepper on a free market. Footnote 45, *supra*, p. 69.

2. If the Court of Claims did not err in considering "retention value" of this type, Commodities cannot complain of the particular evaluation it made. The court expressly considered the first of the three factors now brought forward—*i. e.*, the expected post-war price of pepper—and its specific determination of that factor is not plainly erroneous, though it differs from the owners' conclusion.

The other two factors—*i. e.*, actual post-war selling price,[65] and actual post-war replacement cost—were also apparently considered,[66] but they are entitled to only slight weight in evaluating "retention value" as of May 1944. The value of the condemned property is to be determined as of the date of taking, and, as the Court of Claims itself has held, "retention value" also is to be determined and fixed as of that time. *Fabrica Uruguaya de Neumaticos, S. A.* v. *United States*, 84 F. Supp. 745, 747 (rejecting an actual post-war price as the measure of "retention value"). And actual post-war pepper prices were the resultant of so many variables, many of which were unforeseeable or unmeasurable in May 1944, that the court below cannot be charged with error in failing to find that the expected post-war price, as of May 1944, was the same as the actual price turned out to be.

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[65] This factor is mentioned in the petition in No. 163 (see fn. 64, *supra*, p. 102), but is apparently abandoned in the brief on the merits (Br. 5–6, 53, 55).

[66] The court made findings as to the post-decontrol prices (R. 18), and refers to these prices in its opinion (R. 26). The opinion later states that the court considered certain unspecified events occurring after the requisition, in determining "retention value" (R. 27), but it is not expressly indicated whether the post-decontrol prices were considered in judging the price Commodities "could have secured for its pepper had it been permitted to hold it until after restrictions had been removed" (R. 27). However, the quoted language covers these 1946 prices.

D. SUBSEQUENT SALES OF PEPPER AT HIGHER PRICE CEILINGS

In addition to "retention value" (discussed *supra*, pp. 102–104) and the cost of the pepper discussed *supra*, pp. 99–102), the Court of Claims considered the price at which Commodities *subsequently* sold pepper [domestic sales at 10 and 16 cents per pound; sales in Puerto Rico at average price of 14.19 cents a pound] as elements in determining just compensation. We believe that these later sales are in large measure irrelevant to the determination of the prescribed compensation. At most, only the sales at 10 cents a pound had any real bearing on the issue before the court, and those sales indicated a valuation of the pepper by Commodities at substantially less than the 15 cents a pound which was allowed.

1. The Puerto Rican sales have little bearing on just compensation. In addition to the fact that these sales were made in June, 1945—more than a year after the requisition here involved and at a price based, in accordance with the Second Revised Maximum Export Price Regulation (8 Fed. Reg. 4132), on the increased ceiling price then in effect (R. 19) (see *infra*, pp. 113–115)—these sales involved less than 1% of Commodities' holding (124,000 pounds (R. 19)) and unlike *United States* v. *New River Collieries Co.*, 262 U. S. 341 (discussed in fn. 10, *supra*, p. 34), there was no evidence either that the Puerto Rican market could have absorbed any additional pep-

per, or that Commodities desired to sell in that market. As far as it appears, these small Puerto Rican sales, together with the even smaller sales, aggregating 35,000 pounds, to Argentina authorized by export license (R. 91), were the only foreign sales made by Commodities.[37]

2. Nor do the later domestic sales at increased OPA ceiling prices indicate that the Price Administrator thought that the earlier ceiling was unfair or that the fair value of pepper had increased. The price ceilings in effect at the time of those sales [10 cents a pound in October, 1944, and 16 cents a pound in March, 1946] were fixed not because the Price Administrator considered the original 6.63 cent ceiling price to be no longer "fair and equitable", but rather because each time Commodities had required these increases as the terms under which it would agree to sell pepper for civilian consumption. See *supra*, pp. 50–51.

Whatever validity there may be to Commodities' suggestion that these sales were made "involuntarily" and solely because of pressure (but cf. *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, 190), it seems clear that the needs of the

[37] The South American export price referred to at Commodities' Br. 12, 42, 45, was only available to exporters obtaining licenses. There is no showing whatever that Commodities sought, desired, or could have obtained such licenses, nor in what amounts they would have been allowed if request had been made.

economy exerted far greater pressure on the Price Administrator to accede to terms dictated by Commodities. Virtually no pepper was available for needed civilian purposes. Commodities owned the bulk of the available pepper supply and was adamant in its refusal voluntarily to part with any of its holdings at the established 6.63 cent ceiling. All during the period from February 1942, when that ceiling price was first fixed, until October 1944, when the ceiling price was raised to 10 cents a pound, Commodities retained its holdings and refused to sell any substantial part of it, despite the public's urgent needs. Indeed, when the Government sought to requisition some of the pepper for civilian use in early 1944, Commodities obtained an injunction against its consummation. See *supra*, p. 50. It was only after every means for cutting Commodities loose from its holdings had been exhausted that the ceiling prices were increased to meet Commodities' terms. See the Price Administrator's Statement of Considerations on the first increase, OPA Price Service Food Desk Book, Vol. 2, p. 16731 (quoted in pertinent part, *supra*, p. 51). Prices so determined clearly do not indicate what the Office of Price Administration regarded as the lowest "fair and equitable" price. On the contrary, even such legally-authorized prices may be said to reflect a "hold-up value, not a fair market value" (*United States* v. *Cors*,

337 U. S. 325, 334), stemming from Commodities' near-monopoly of pepper, and should not be considered in determining just compensation for the earlier taking. See *supra*, pp. 56–57, 63–66.

An additional factor indicating the irrelevance of the sales at 16 cents a pound is that these sales occurred approximately two years after the requisition. Reliance on these sales ignores the fundamental principle that the value of the property taken is to be determined as of the time of taking. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246.

3. The only sales that might be relevant to the determination of Commodities' compensation—if the price ceiling at the time of taking is rejected—are the domestic sales at 10 cents a pound. These took place about 6 months after the requisition, and although they were made subsequent to the present requisition and at OPA ceiling prices, the price, it must be remembered, was fixed with the agreement of Commodities. See *supra*, pp. 9–10, 50–51. This fact, taken together with Commodities' offer, prior to the instant requisition, to sell 1,000,000 pounds to the War Department at 9¾ cents a pound (R. 20) (*supra*, p. 8) indicates that Commodities' own contemporaneous valuation of the pepper was substantially lower than the amount fixed by the Court of Claims. Cf. *Vogelstein &*

Co. v. *United States*, 262 U. S. 337 (discussed *supra*, pp. 54–55).

E. THE INDIAN MARKET

Although the Court of Claims made findings as to the price at which pepper could, in 1944, have been imported from India pursuant to an allocation of the Allied Food Commission, the court, properly we submit, did not consider these prices in determining Commodities' compensation. The court below found (R. 21) and Commodities has conceded (Br. 46–48) that "American importers were unable to take advantage of the allocation of British pepper" (R. 21). None of the Indian pepper actually was imported into the United States in 1944, because of valid restrictions imposed by the Office of Price Administration and no Indian pepper was sold or used here.[28]

The price of that pepper, therefore, was not, as Commodities claims (Pet. 47), "probably the

[28] Contrary to Commodities' suggestion (Br. 47–48), none of the Indian pepper purchased by the Government's Commodity Credit Corporation in 1945 (a year or more after the requisition here involved) and exported by private exporters to South America, was used domestically. This pepper had been allocated for South American consumption by the Combined Food Board and its distribution through the New York exporters followed t. regular distributing channels (R. 46–47). Nor was the Army's 1954 purchase of Indian pepper relevant. These purchases were long after the requisition at bar and were made pursuant to an exception granted by OPA to protect the domestic supply for civilian consumption (R. 48–49).

fairest and most tangible basis for allowance to plaintiffs." On the contrary, it had no relationship whatever to Commodities' damages or to the value of the requisitioned pepper at the time and place of taking in the United States, since American buyers and sellers could not lawfully avail themselves of this Indian pepper for resale in the United States. Valuation of the seized commodity must take account of such valid restrictions, and the situation must be viewed as if the Indian pepper did not exist or were physically unobtainable in American markets. *Supra*, pp. 36–41. Cf. *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. A. 2); *Bowles* v. *Willingham*, 321 U. S. 503, 517; *Perry* v. *United States*, 294 U. S. 330, 354–358; *Nortz* v. *United States*, 294 U. S. 317, 328–329; see *United States* v. *Toronto, Hamilton and Buffalo Navig. Co.*, this Term, No. 39, decided December 12, 1949, slip op. pp. 9–10.[69]

F. OTHER PEPPER CEILING PRICES AT THE TIME OF REQUISITION

Commodities presents four or five special pepper ceiling prices—in addition to the general maximum of 6.63 cents which was admittedly applicable to it—and claims that it could have availed itself, in May 1944, of any of these special

[69] Commodities apparently suggests (Br. 46–48) that the failure to admit Indian pepper, and the level of the Indian market price, indicates the unfairness of the general ceiling price, but this point was never made to the Emergency Court, and is not open here. *Supra*, pp. 30–34.

ceilings in order to obtain more than 6.63 cents per pound (Br. 12, 41–45, 57–58). The fact is that Commodities never sought to bring itself within the limited classes covered by these other ceilings, and they are wholly inappropriate to measure just compensation for its pepper.[70]

1. The exception from the general price ceiling of sales of less than one bag (150 lbs.) (*infra*, p. 126)—even if Commodities could lawfully take advantage of the privilege—is obviously inapplicable to a requisition of 759,750.88 pounds (R. 13).

2. Similarly, the ceiling price for imitation black pepper (R. 18–19) has no place here. Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured product was established on a different basis—cost of manufacture plus a fair profit—from those for products traded prior to the imposition of price controls. See Section 2 (a) of the Emergency

[70] There are also suggestions in Commodities' brief (Br. 9, 12, 41–45, 57–58) that the existence of these special ceilings somehow proves the unfairness of the general maximum. This is an argument which likewise should have been addressed to the Emergency Court of Appeals, and the compensation court is not the proper forum to hear or decide such challenges. The unchallenged basic maximum must be accepted as generally fair and equitable. Moreover, even to those not expert in the pepper industry, it seems plain that the Price Administrator promulgated these separate ceilings for good reasons, and that they are based on rational and persuasive distinctions.

Price Control Act of 1942, 50 U. S. C. App. 902 (a). Despite the 30-cents-per-pound price Commodities now says it could easily have secured by manufacturing imitation black pepper (Br. 6, 12, 42–43, 58), the record contains nothing to indicate that it was ever anything but a speculator or "investor" in pepper, or that it desired or was able to do this type of manufacturing, or what it would cost it to make the synthetic product. By its own admission, Commodities has never associated with the spice trade generally (Pet. 39); "it was in no sense a regular commercial undertaking" (R. 52). Indeed, there is nothing to show that Commodities ever engaged in grinding pepper, or other spice processing of any kind, that it ever attempted or desired to enter this field, or that, in wartime, it could have secured the equipment or facilities necessary to have done so. This special ceiling price, then, was not in reality available to Commodities—as is proved by its own failure to take advantage of a very high price it now says it could easily have secured—and it is wholly irrelevant to the present proceeding.

3. Commodities also mentions the 12½-cent ceiling price on real ground pepper (R. 19) (Br. 45). But, as we have just stated, there is not a syllable in the record suggesting that Commodities could, or would, have engaged in the grinding business during the war, and almost

nothing to indicate what it would have cost it to make the ground product. The ground pepper ceiling price approximately took into account not only the cost of the whole pepper, but the normal differential, including the cost of grinding, packaging, and marketing. Real ground pepper was closely analogous to whole black pepper, and its ceiling price, reflecting additional elements of costs, both supports the fairness of the ceiling price on whole black pepper and suggests that Commodities' manufacturing costs would have been such that it would avail it nothing, in this proceeding, to insist that it could have made ground pepper and sold that commodity at its ceiling price.

4. Finally, the export price at the time of requisition is likewise immaterial. The record does not disclose that there were any export sales made at or about the time when the pepper was requisitioned, or that Commodities engaged generally in the export business. *Supra*, pp. 105–106. Nor is there any showing that Puerto Rico, Alaska, and Hawaii could or would absorb any significant portion of the 760,000 pounds seized here. And Commodities has not proved that the costs of such export sales (which would have to be deducted if this special ceiling is used) would not be sufficiently high to offset any excess over the domestic price.

Moreover, a reading of the whole black pepper

maximum price regulation, in conjunction with the general export regulation in effect at the time of requisition (the Second Revised Maximum Export Price Regulation, 8 Fed. Reg. 4132), leaves it unclear as to whether the general export regulation governed export sales of pepper at that time (May 1944).[71] In any case, even if the formula for computing the price ceiling provided in the general export regulation were applicable, the proper price would probably have been no more than 9.4 cents a pound, an amount substantially less than the 14.19 cents a pound received by Commodities on its Puerto Rican sales (*supra*, pp. 105–106). This is so because, under that formula, export prices are based on domestic ceilings, which at the time of requisition were 6.63 cents a pound, whereas the ceiling price at the time of the later Puerto Rican sales was 10 cents (R. 19). Hence, this contemporaneous export price would support neither Commodities' claim of 22 cents nor the lower court's award of 15

[71] In May 1944, Price Schedule No. 52, establishing the general ceiling on whole black pepper, provided that "the maximum prices for pepper sold for export may exceed" the domestic maximum "by no more than ten percent" (*infra*, p. 126). In October 1944, this was amended to provide that export prices "shall be determined in accordance with the provisions of the Second Revised Maximum Export Price Regulation, as amended." This was characterized in the Price Administrator's Statement of Considerations as a "paragraph which has become standard" (OPA Price Service, Food Desk Book, vol. 2, p. 16,731), but it is not clear whether the amendment was a substantive change or merely a codification of a preexisting rule which the general export regulation had already made applicable to pepper.

cents. If anything, it would indicate the fairness of the War Department's administrative award based on the applicable domestic ceiling price, since export sales normally involve extra costs and services, and the higher ceiling for export sales was predicated on that fact.

Even if the cost of Commodities' pepper could be used, instead of the domestic ceiling, in computing the export maximum (as Commodities now argues; but see R. 19),[72] a fair evaluation of its costs would take into account the fact that Commodities apparently retained its higher-cost pepper during the war and voluntarily disposed of its lower-cost goods before the war. *Supra*, pp. 58, 61–63. On a fairer cost basis, it is unlikely that the export price would be anywhere near as high as the 14 cent price Commodities urges. Subtracting the extra costs attributable to exporting, it is doubtful whether Commodities could gain anything by use of the export rather than the domestic ceiling.[73]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be reversed, with directions to enter an

[72] Archibald, who handled the 1945 Puerto Rico sales for Commodities, testified, as its witness, that the export differential was added to the current domestic ceiling price, and not to cost. See testimony in the Court of Claims at pp. 243–24.

[73] On the ceiling price for the restricted export sales to South America (Br. 45), see fn. 67, *supra*, p. 106.

appropriate judgment for respondents in 156 (petitioners in No. 163) on the basis of the general maximum ceiling price for whole black pepper in effect in May 1944, together with appropriate interest.[74]

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JANUARY 1950.

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[74] The judgment would include (1) an award of $50,266.76 (R. 14), plus (2) compensation for delay in payment from May 26, 1944 (the date of requisition) to September 26, 1945 (the date of the administrative award), at 4 percent—amounting to $2,680.89 (an aggregate sum of $52,947.65), less (3) the sum of $26,404.14, already paid on account (R. 15). The balance amounts to $26,543.51.

APPENDIX A

The pertinent portions of the general wartime Requisitioning Act, as it read at the time of the requisition involved here (Act of October 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 181, and the Act of June 30, c. 181, 57 Stat. 271),[1] provided as follows:

> Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as herein-

[1] The statute was thereafter amended, in respects of no significance to this case, by the Act of June 28, 1944, c. 307, 58 Stat. 624, and the Act of June 30, 1945, c. 208, 59 Stat. 271. See 50 U. S. C. App., 1940 ed. Supp. V, 721. The Act has expired by its own terms. See note under "Codification," 50 U. S. C. App., 1946 ed., 721).

after provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

APPENDIX B

The pertinent provisions of the Emergency Price Control Act of 1942 (Act of January 30, 1942, ch. 26, 56 Stat. 23, 50 U. S. C. App. 901), provide as follows:

> SEC. 2 (a) [50 U. S. C. App. 902 (a)]. Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluc-

tuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof,

and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the forgoing provisions of this subsection.

* * * * *

SEC. 204 (a) [50 U. S. C. App. 924]. Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall

have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided

in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

APPENDIX C

REVISED PRICE SCHEDULE NO. 52—PEPPER

(As effective on May 26, 1944)

(6 Fed. Reg. 6375, as amended by 7 Fed. Reg. 724, 1308, 1836, 2132, 6385, 8948, 8 Fed. Reg. 13244)

Pepper is one of the imported commodities which in the past have often been sharply influenced by speculative price manipulations. It is the most important and widely distributed spice used by the American housewife and by packing industries. The outbreak of hostilities in the Far East on December 7, 1941, gave rise to a sharp increase in speculative activity which caused this Office on December 11, 1941, to issue a temporary price freezing order, limiting prices to those prevailing on December 8, 1941.

In the intervening weeks, this Office has engaged in a thorough study of the economic and trade position of pepper. Due consideration has been given to the prices prevailing during the period October 1 to October 15, 1941, with adjustments for relevant factors. To prevent further price increases and to maintain the stability recently achieved, the Office of Price Administration hereby issues a permanent price schedule for black and white pepper.

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected.

Accordingly, under the authority vested in me by Executive Order No. 8734, it is hereby directed that:

§ 1351.101 *Maximum prices for pepper.* On and after December 11, 1941, no person shall sell, offer to sell, deliver, or transfer pepper, and no person shall buy, offer to buy, or accept delivery of pepper at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1351.111, except that contracts entered into prior to February 3, 1942, but subsequent to December 11, 1941, may be carried out at prices not higher than the maximum prices contained in Price Schedule No. 52 as effective prior to this amendment No. 1, and that contracts entered into prior to December 11, 1941, may be carried out at the contract prices. (See § 1351.110.)

§ 1351.102 *Export sales.* The maximum prices for pepper sold for export may exceed the prices set forth in § 1351.111 by no more than ten percent.

§ 1351.103 *Exempt sales.* Sales of pepper at retail and sales of less than one bag of pepper shall be excepted from the operation of Price Schedule No. 52.

§ 1351.104 *Less than maximum prices.* Lower prices than the maximum prices established by Price Schedule No. 52 may be charged, demanded, paid, or offered.

§ 1351.105 *Evasion.* The price limitations set forth in Price Schedule No. 52 shall not be evaded whether by direct or indirect methods in connection with a purchase, sale, delivery, or transfer of pepper, or by way of premium, commission,

service, transportation or other charge, or by any other trade understanding, or by making the discounts given or other terms and conditions of sale more onerous to the purchaser than those available or in effect on December 11, 1941, or by any other means.

§ 1351.106 *Records and reports.* (a) All sellers and all buyers who have entered into contracts prior to February 3, 1942, for the sale or delivery of pepper, on or after February 3, 1942, at prices higher than the maximum prices established by Price Schedule No. 52, shall report all such contracts to the Office of Price Administration on or before February 25, 1942, stating (1) the name and address of the buyer and seller; (2) the actual date of the contract; (3) each and every delivery date provided for in the contract; and (4) the price, quantity, and description of the product sold.

After the buyer has received the final shipment called for by the contract he shall then report such receipt to the Office of Price Administration within two weeks thereof, certifying that the total amount received did not exceed the quantity specified in the contract.

(b) Every person making purchases or sales of pepper on and after February 3, 1942 shall keep for inspection by the Office of Price Administration for a period of not less than one year complete and accurate records thereof, including the name of the purchaser, the date of the contract, the price paid or received, and the type, grade, quality, and amount sold.

(c) Every person affected by Price Schedule No. 52 shall submit such reports to the Office of

Price Administration as it may from time to time require.

§ 1351.107 *Petitions for Amendment.* Any person seeking an amendment of any provision of this Revised Price Schedule may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1.

§ 1351.108 (a) *Enforcement.* (1) Persons violating any provision of this Revised Price Schedule No. 52 are subject to the criminal penalties, civil enforcement actions, and suits for treble damages provided for by the Emergency Price Control Act of 1942.

(2) Persons who have evidence of any violation of this Revised Price Schedule No. 52 or any price schedule, regulation or order issued by the Office of Price Administration or of any acts or practices which constitute such a violation are urged to communicate with the nearest field or regional office of the Office of Price Administration or its principal office in Washington, D. C.

§ 1351.108a *Licensing.* The provisions of Licensing Order No. 1, licensing all persons who make sales under price control are applicable to all sellers subject to this regulation or schedule. A seller's license may be suspended for violations of the license or of one or more applicable price schedules or regulations. A person whose license is suspended may not, during the period of suspension, make any sale for which his license has been suspended.

§ 1351.109 *Definitions.* (a) "Person" includes an individual, corporation, partnership, association, or any other organized group of persons, or

legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of the foregoing.

(b) "Sales at retail" means sales to the ultimate consumer: *Provided,* That no grinder, processor, purchaser for resale, or commercial user shall be deemed to be an ultimate consumer.

(c) "Cost of putting pepper into the warehouse" includes (1) "Labor in and out" and (2) warehouse storage charges for not more than thirty days.

(d) "Pepper sold for export" means sales by a domestic seller directly to a foreign buyer and/or foreign broker.

§ 1351.110. *Effective date of Price Schedule No. 52.* This Schedule (§§ 1351.101 to 1351.108, inclusive) shall become effective on December 11, 1941.

§ 1351.111 *Appendix A: Maximum prices for pepper.* (a) The maximum prices shall include all import commissions. The maximum prices shall also include all other charges, except that:

(1) Increases in the charges prevailing prior to the opening of business on December 8, 1941 for ocean freight, war risk insurance, and marine insurance may be added to the maximum prices only if such charges have been actually incurred by the seller on such sale. Decreases in said charges prevailing prior to the opening of business on December 8, 1941 must be subtracted from the maximum prices.

(2) If the services of a broker or brokers are required, a commission or commissions which in

the aggregate shall not exceed one percent of the selling price may be added to the maximum price, provided such commissions have been actually paid.

(b) The maximum prices for pepper shall be as follows:

	Cents per pound ex dock New York City
Lampong Black Pepper	6.50
Aleppy Black Pepper	8.50
Muntok White Pepper	11.50
White Small Berries	10.50

The maximum prices for pepper imported from any other country or for grades of inferior quality not named shall be determined by applying the customary trade differentials to the above prices.

(c) The maximum prices quoted above are ex dock New York City. The maximum prices ex dock any other port of entry shall be determined by adding to or subtracting from the New York City Price the difference the actual cost of ocean freight, war risk insurance, and marine insurance from the port of origin to New York City and the actual cost of ocean freight, war risk insurance, and marine insurance from the port of origin to such other port of entry.

(d) For any pepper sold ex warehouse, rather than ex dock New York City or any other port of entry, the cost of actually "putting the pepper into the warehouse" as defined in § 1351.109 may be added by the seller who incurred the cost.

(e) The delivered price for pepper shall in no case exceed the maximum prices specified above plus actual transportation charges incurred from the dock or warehouse at New York City or other port of entry to the place of destination or to

the place of ship loading, if the pepper is intended for export.

(f) Any person making sales of pepper in lots of 100 bags or less may add to the maximum prices specified above an amount which shall not exceed:

5% on sales of 50 to 100 bags
7½% on sales of 25 to 49 bags
10% on sales of 5 to 24 bags
one cent on sales of 1 to 4 bags

(g) The above prices shall be the maximum prices for all transactions except for futures contracts traded on the New York Produce Exchange. In such contracts the maximum prices shall be the prices listed below. The maximum prices for futures contracts for months, if any, after October, 1942, shall not exceed 6.63 cents per pound. The maximum prices for futures contracts, if any, traded in months currently inactive shall not exceed the maximum prices for the last active preceding month.

	Cents per pound
March	6.35
May	6.48
July	6.50
September	6.60
October	6.63

Issued this 11th day of December 1941.

LEON HENDERSON,
Administrator.

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Supreme Court of the United States

October Term, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156.

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION
and others,
Defendants in Error.

Brief for Commodities Trading Corporation, et al., Plaintiffs Below, and Plaintiffs in Error in No. 163 and Defendants in Error in No. 156.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
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I.

Opinions Below.

The prevailing and dissenting opinions of the Court of Claims are reported in 83 Fed. Supp. 356.

II.

Jurisdiction.

The Statutory provision believed by the petitioners to sustain jurisdiction of this Court is Title 28, U. S. Code Annotated, Section 288, as provided by the Act of February 13th, 1925, Chapter 229, Sec. 3; 43 Stat. 939.

2. The Statute involved is Public Law 274, 77th Congress, approved October 16, 1941, Chapter 445, as amended by Public Law 507, 77th Congress, approved March 27, 1942; Public Law 104, 78th Congress, approved June 30, 1943. The pertinent provisions of this Statute are as follows:

> "That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval * * * supplies * * * is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, * * *. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act, * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the

Fifth Amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for such property, is unwilling to accept the same as full and complete compensation for such property, he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by Sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 [20] and 250) for an additional amount which, when added to the amount so paid to him, he considers to be the fair and just compensation for such property. * * * "

3. The judgment of the United States Court of Claims was rendered on the 4th day of April, 1949 (R. 25). This petition was docketed on the 5th day of July, 1949, the 3rd and 4th of July, 1949 being legal holidays.

4. The basic question relied upon by the petitioners to induce this Court to review the decision of the Court of Claims is the question of the value of property requisitioned by the United States Government from the plaintiffs where, by reason of price ceilings and restrictions instituted and enforced by the defendant, there did not exist any free market in the United States for the property requisitioned, but where the property was non-perishable and could have been retained by the Plaintiffs until after the War was over and the price restrictions removed, and in fact was intended to be so retained when purchased, and when a value based upon each suggested measuring stick, except that of ceiling price, was considerably in excess of the value found by the Court of Claims.

III.

Statement of the Case.

This matter comes before this Court upon the Petition of Certiorari to the Court of Claims presented by Commodities Trading Corporation and others plaintiffs below and filed July 5th, 1949, in Case No. 163; and upon Petition of the United States, defendant below, filed July 2nd, 1949, in Case No. 156, both of which Petitions were granted by this Court on October 24th, 1949.

To avoid confusion, the parties will be referred to hereinafter as "Commodities" and "The United States" as each is both plaintiff in error and defendant in error.

This suit was brought by the plaintiffs in error, Commodities Trading Corporation and Irving Trust Company against the United States to recover just compensation for 759,750.88 pounds of Whole Black Pepper requisitioned by the United States from the Commodities Trading Corporation on or about May 26th, 1944 (R. 7-10). The plaintiff in error, Commodities Trading Corporation, hereinafter called "Commodities", owned the said pepper, and the Irving Trust Company had a lien on said pepper for bank loans made by it to Commodities on the security of said pepper (Spec. Fdgs. Nos. 4 and 5, R. 13-14).

The other plaintiffs in error are stockholders of Commodities, who received fractional parts of the claim sued on herein upon the dissolution of Commodities on or about January 22nd, 1946, and who intervened as parties plaintiff in March 1948 (Spec. Fdgs. Nos. 1 and 2, R. 12-18).

The War Department requisitioned the pepper pursuant to the Act of October 16th, 1941 (55 Stat. 742), as amended, and on September 25th, 1945, tendered Commodities $50,266.76 as just compensation, the said amount being based on the ceiling price for such pepper in effect

at the time of taking, as established by Maximum Price Regulation No. 52 (Spec. Fdgs. 3, 4, 6-7, R. 13, 14 and 15).

Commodities declined to accept the said determination of just compensation, claiming that the pepper requisitioned was, on the date of the taking, worth at least $190,000 (Spec. Fdgs. 6 and 7, R. 14, 15).

The Army proceeded to seize the pepper without making the payment provided for by said 55 Stat. 742, and Commodities brought suit on the 3rd day of October, 1945 (R. 1-5), for $190,000. with interest which it alleged was a minimum allowance for just compensation. On the 27th day of November, 1945, two months thereafter, and eighteen months after seizure, one-half of the award offered by the War Department, with 4% interest, or $26,404.41, in all, was paid to Commodities (Spec. Fdg. ..., R. 14 and 15). The said $190,000 and interest, less the said sum of $26,404.41, with interest paid as above stated, is therefore the amount involved in this suit.

At the time of taking and for many months before and for several months thereafter, there was no market for whole black pepper in the United States and not a pound thereof had been offered for sale (Spec. Fdg. 19, R. 19). Therefore, recourse must be had to other factors to show value, or just compensation.

The Government asserts that the ceiling price of 6½¢ per pound fixed in January, 1942 is the only measure of just compensation, and that the following bases of value submitted by Commodities should be ignored:

> (a) the market price in India in May 1944 of 21¢ for Whole Black Pepper delivered in New York, insurance and freight paid (Spec. Fdg. No. 23, R. 21, R. 41-42) (considered at pages 46 to 47, *infra*); or
>
> (b) the price which, in May 1944, it was reasonable to expect, could be obtained for Whole Black

Pepper at the end of price control, less carrying charges to that time, pepper being non-perishable and easily stored (Spec. Fdg. No. 25, R. 22), a price far in excess of 21¢ (Spec. Fdg. No. 17, R. 18, 40) (considered at pages 53 to 56, *infra*); or

(c) the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, had there been no War, a price in excess of 20¢ (Spec. Fdgs. 26, 15-17, R. 18, 22-23, 40, 42-43, 50, 65-70, 81-82, 85-87, 99-102, Tr. 35-37, 141-143) (considered at pages 48 to 53);

(d) Replacement cost—more than 50¢ per pound (Spec. Fdg. 17, R. 18, 56, 79) (considered at pages 53 to 57, *infra*); or

(e) the net price for its pepper which could have been obtained in May 1944 through the use of said Whole Black Pepper in producing synthetic or imitation pepper and the sale of said imitation pepper at the ceiling price established therefor by the Office of Price Administration, a price in excess of 30¢ (Spec. Fdg. No. 18, R. 18-19) (considered at pages 57 to 58, *infra*); or

(f) Commodities out-of-pocket cost plus an allowance for gratuitous services rendered over eight years by its officers an amount in excess of 20¢ (Spec. Fdg. No. 24, R. 21-22) (considered at pages 58 to 60).

The Court of Claims found that the value of the pepper was 15¢ a pound (Spec. Fdg. No. 27, p. 23), or about 7¢ a pound less than the lowest value which could have been found on any one of the above bases.

This was a compromise, as stated by the Court of Claims itself. It took into account some of the above

enumerated factors (a) to (f) *supra* but then considered sales made at 10¢ after October 1944 under compulsion and under special agreement with O.P.A. and other sales at 14.19¢ and 16¢ in 1945 and 1946, respectively (Spec. Fdgs. 19 & 20, R. 19 and opinion of Court of Claims R. 27).

As the Complaint asks for compensation at the rate of only 22 cents per pound, the fact that some of the bases mentioned in (a) to (f) above would support a much higher price is immaterial.

Facts.

Most of the facts hereinafter referred to were found by the Court. There was no contradiction of Commodities' evidence and the facts referred to but not found were proven by the undisputed evidence and errors were assigned for the failure of the Court of Claims to so find.

Ceiling prices were fixed by the Office of Price Administration for Whole Black Pepper as follows:

On December 11, 1941 Price Schedule 52 was issued establishing a ceiling price of 6.75¢ a pound, ex dock or warehouse, New York City (Spec. Fdg. 9, R. 15). This was the market price the day after Pearl Harbor (R. 59).

On February 3, 1942 said Schedule 52 was amended and the ceiling price fixed at 6.50¢ per pound (Spec. Fdg. 12, R. 17). This was the approximate market price at the date of fixation (R. 88).

In October, 1944, said Price Schedule was again amended and a ceiling price of 10¢ per pound was fixed Spec. Fdg. 19, R. 19).

In March, 1946 said Schedule was further amended and a ceiling price of 16¢ was fixed (Spec. Fdg. 19, R. 19).

Immediately after the removal of Price Ceilings in August, 1946, Whole Black Pepper was actively sold and traded in at 50¢ to 60¢ per pound and upward (Spec. Fdg. 17, R. 18).

It had risen to 80¢ per pound when this trial began, the 30th day of May, 1947 (R. 40, 80) and is now $1.00 per pound.

In 1941, when the War clouds over the East Indies, where pepper of the kind here in question is produced, began to become ominous the war frightened East Indians dumped their pepper on the New York market, which was the only place open to them (R. 108). Mr. Leon Henderson, the first head of O.P.A., published a strong statement in criticism of the purchasers of pepper and required the New York Produce Exchange, which was the market in which contracts for future delivery of pepper were made, to increase its margin four-fold, making the margin requirement nearly 100% of the market price of the pepper (R. 109, 89-90).

However, despite these two factors which operated strongly to depress prices, they rose from 4.1 cents per pound in January 1941 to 6.75 cents per pound at the time of Pearl Harbor (Spec. Fdgs. 9 and 10, R. 15-16).

It was three or four months after Pearl Harbor before the Dutch Indies were actually invaded and during this time the shipment into the United States, or the so-called "dumping", was carried on at a high rate (R. 108).

As a result there was piled up in the hands of importers in the United States from 78,000,000 to 100,000,000 pounds of Whole Black Pepper by March, 1942 (Fdg. 8; R. 15). This was a three years supply for continental United States under ordinary circumstances (Fdg. 8, R. 15).

Largely because of this glut of pepper, but partly because of the actions taken by Mr. Leon Henderson (R. 109, 89-90) and the establishment of a ceiling price which discouraged holders and caused many to sell out (Spec. Fdg. 11, R. 16), as above stated, there was a depressed

market, both in December 1941 and February and March 1942.*

In March 1942 the Japanese invaded the Dutch East Indies and the United States was cut off from supplies of pepper from all pepper producing countries except British India (R. 45). It soon became evident that the said 78,000,000 to 100,000,000 pounds was inadequate to supply the United States and South America, Canada and other countries which the United States, either under the good neighbor policy, or by reason of its alliance with England, was supplying (Spec. Fdg. 13, R. 17-18, 70). By September, 1943, there were only 30,000,000 pounds of Whole Black Pepper left in the hands of importers in the United States (Fdg. 14; R. 18, 61).

This reduction had taken place despite the fact that rationing had brought down to only 40 per cent of normal prewar consumption the amount of pepper which could be bought or sold (Spec. Fdg. 13; R. 17-18).

During the said period from February 3rd, 1942 to May, 1944, a great scarcity of pepper had been created throughout the whole world and despite exports from the United States, in some countries, where there was no ceiling price, the market price was as much as $2.00 per pound (R. 41, 44, 48, 55, 56, 61-62, 72, 78, 79).

By March, 1944, the shortage of pepper in the United States had become so great that the Department of Agriculture sought to requisition practically the entire 30,000,000 pounds, or thereabouts, left in the country, but was enjoined by Commodities (R. 131).

To meet the acute shortage large quantities of pepper were ground and mixed with parched corn or cottonseed

*Though the value of Lampong pepper produced in Sumatra is the same as the Indian peppers, Malibar, Alleppy and Tellicherri (R. 39) the O.P.A. price, which was based on market was one-third greater for the Indian pepper than for the Lampong pepper (O.P.A. Reg. 52). Of course, the danger of immediate invasion was much greater in the case of Sumatra than in that of British India.

hulls and the mixture, one-quarter or less real pepper and three-quarters or more neutral agents, was called synthetic or imitation pepper, and was sold at 16¢ a pound and more under ceiling prices fixed therefor by O.P.A. at the same time that it was maintaining the 6½¢ per pound for whole real pepper (Spec. Fdg. 18, R. 18-19, 106). The cost of grinding is less than ½¢ per pound (R. 106).

A simple calculation shows that the sellers of imitation pepper realized about 30¢ net per pound for the pepper contained in the concoction.

As may be imagined, the 6½ cent O.P.A. ceiling price was not in keeping with the above described conditions and in the language of one of the witnesses, O.P.A. "prevented" a market. What happened to the market more in detail is as follows:

Following March 1942, there was considerable activity in the pepper market, due to the fact that the importers of pepper who were mostly little people, when faced with ceiling prices, sold out (Fdgs. 11 & 15). However, this selling dried up quickly, and after the middle of 1942, there were few sales (Spec. Fdgs. 11 & 15, R. 16 & 18).

From January 1944 to October, when the ceiling price was raised to 10 cents, as above stated, there were no offers whatever of whole black pepper (Spec. Fdg. 19, R. 19) and this condition had continued to practically the same extent since September 1943 (Spec. Fdg. 14, R. 18).

During this period of great shortage, there were large supplies of pepper, of the kind here in question, in British India, which was the largest producer of black pepper next to Sumatra, Dutch East Indies, and, in fact, was the only other large producer of pepper (Fdg. 23, R. 21). 20 million pounds of this pepper was available for shipment to the United States, the Joint Food Control Board of England and the United States having allocated for exportation to the United States 10 million pounds in 1943 and 10 million in 1944 (Spec. Fdg. 23, R. 21).

While there was no ceiling price in India, and the Indians could trade among themselves and were themselves large users of pepper, the market price of Indian pepper delivered in New York was only 21 cents per pound against a selling price in South America of $2.00 due to the fact that the British Government restricted the exportation of pepper and permitted shipments only to such points and in such quantities as the British Government considered was in the interest of the War economy (Spec. Fdg. 23, R. 21, 41-43, 72, 78-80). All or any part of the 20 million pounds above referred to was available for importation into the United States in May, 1944 (Fdg. 23). But O.P.A. refused to permit the importation of any of this pepper in 1943 and 1944 and not a pound of this was admitted until 1945 (Spec. Fdg. 23, R. 21, 80).

Whole Black Pepper is not perishable and lasts for many decades (Fdg. 25). It is easily stored and the cost of storage was ½ cent per pound per year, as stated by Commodities and as found by the Court of Claims (Spec. Fdg. 24, R. 21-22, 92). Mr. Bowles of O.P.A. stated it at only about ⅛th of a cent per year (R. 37). If Commodities had held its pepper until the end of price control, it could have received from 50 to 60 cents a pound therefor (Spec. Fdg. 17, R. 18).

While this was not known in a definite legal sense in May 1944, at that time the members of the Advisory Committee of the Spice Trade advised O.P.A. that the price could be kept between 20 and 30 cents a pound and a market could be maintained if it would permit the Indian pepper to come in, but that if the low ceiling prices were retained there would be a rebound to prices much higher than 30 cents a pound, upon the end of price control. O.P.A. retained its low prices and the rebound took place (Spec. Fdgs. 16, 17, R. 18).

Moreover, many factors existing in May 1944 showed the inevitability of a high price at the end of the War.

These included the world-wide shortage existing at that time (R. 41), the failure of the natives to plant new pepper vines for about five years immediately preceding the War, discussed shortly hereinafter (R. 101, 102), and the destruction of pepper and pepper vines by the Japanese invasion in March 1942 (R. 102). So even in May 1944 it was practically certain that Commodities could get several times the 6½¢ ceiling price if it kept its pepper until after the end of price control.

While the O.P.A. was adamant in refusing to increase its general ceiling price of 6½ cents, provided for by Reg. 52, there were many opportunities open to Commodities, and other importers of pepper, to sell at much higher prices without violating any O.P.A. Regulations. These opportunities existed in May 1944 and for many months before and after and included the following:

> Conversion to synthetic or imitation pepper and obtaining the equivalent of approximately 30 cents per pound, mentioned above (Spec. Fdg. 18, R. 18-19);
>
> Sales to Porto Rico, Hawaii and Alaska at O.P.A. ceiling prices more than twice the 6½ cent price (no export license required) (Spec. Fdg. 20, R. 19);
>
> Sales to South America at O.P.A. prices in some cases three times the said 6½ cent price, but licenses required from Department of Agriculture (R. 90-91, 71);
>
> Sales of less than one full bag (150 lbs.), Regulation 52 having exempted from its provisions quantities smaller than a full bag. Sales of such quantities could have been made generally with the consent of the Department of Agriculture. Moreover, according to a reasonable construction of its F.D.O. 19, no such consent was needed by Commodities. In any event, there were large classes to

which Commodities could have sold without any consent, such as the Red Cross, Steamship Companies and several other large classes of users (This is discussed in Point Sixth, *post*).

In addition to the above outline of the facts there is another important fact. Both the owner and the commodity were most unusual in some of their features which affect the question here involved in no small degree.

Commodities was an anomalous organization. It was an investor in pepper, not a dealer therein. It began in 1933 to accumulate a holding of fifteen million pounds of whole black pepper but the price fell and Commodities kept buying (Spec. Fdg. 5, R. 13-14, 52-53, 133-134).

By 1938 it had built up an inventory in the United States of twenty-five million pounds. It was no war speculator. It sold eight million pounds thereof prior to the outbreak of the War in December 1941 and repeatedly offered to sell at cost but it refused to sell at O.P.A. price and continued to hold the remainder and had about 60% of the thirty million pounds left in September, 1943, in the hands of importers in the United States (Spec. Fdgs. 5, 14, R. 13-14, 18).

Pepper is an unusual plant. It does not bear any fruit for the first four years, during which constant cultivation is required, but then has an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and lead to neglect of established vines (Fdg. 26, R. 22-23). For five years prior to the War there had been no planting and much neglect (R. 100-102, Fdg. 26, R. 22). This was due to the unprecedented drop in price—from 42¢ to 3¢ per pound caused by over planting (R. 43, 100-102).

Not a pound of pepper could have been produced in 1942, 1943, 1944 or 1945 from pepper vines which had not

been planted prior to the War and very little could have been produced from such vines prior to 1949 (R. 43, 66-68, 101-102; Spec. Fdg. 26, R. 22-23).

Moreover, as the pepper vine has an extreme average bearing life of only eleven years and an active bearing life of only seven years (R. 98-99, 107), the vines which had been planted in the 20s were already ceasing to bear, and this condition and a lessening supply of pepper was bound to result until seven years after new planting had been resumed. This had not taken place up to the Japanese invasion in March 1942 (R. 101-102). This peculiarity of the pepper plant is one of the important factors which made for high prices at the end of the War and has kept the price up to approximately One Dollar or more ever since (Spec. Fdg. 17, R. 18, 40).

The evidence showed that because of this peculiarity of the pepper plant and the failure of the natives to plant new vines, prices in May 1944 would have been in excess of 20 cents a pound, even if there had been no War and no Japanese destruction (Spec. Fdgs. 9, 26, R. 15-16, 22-23, 80-81).

IV.

Commodities expects to rely principally upon Specifications 1 to 31. It expects to review facts referred to in Specifications 31 to 61. These latter errors were all failures to find undisputed facts and will not be reprinted.

Specification of Errors.

The Court of Claims erred:

1. In failing to find that the fair value of 759,750.88 pounds of Whole Black Pepper, the subject of this action, was on May 26, 1944, the sum of $188,500 or 22 cents a pound and in finding instead that said fair value was $113,962.63 or 15¢ per pound.

2. In failing to find that the just compensation to which plaintiffs are entitled for said property requisitioned and payment by the United States therefor is 22¢ per pound, or a total of $188,500, together with interest at 4 per cent, (4%) per annum from May 26, 1944, as an element of just compensation, less the sum of $26,404.14 paid on November 27th, 1945, with interest thereon from the date of payment, and in finding or concluding instead:

> "* * * that the Commodities Trading Corporation, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) plus compensation for delay in payment computed at (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14) and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid" (R. 23).

3. In failing to find that the market price of Whole Black Pepper in British India on May 26, 1944, 21¢ per pound, delivered in New York, with freight and insurance paid, constituted a minimum measure of plaintiffs-petitioners' just compensation for the 759,750 pounds of Whole Black Pepper requisitioned by the United States Army from plaintiff, Commodities Trading Corporation, on the 26th day of May, 1944.

4. In failing to find that the "retention value" of plaintiffs-petitioners' said pepper, that is, the difference between the prices which it was reasonable to estimate on the 26th day of May, 1944, would exist at the end of the War and upon decontrol of pepper from Government fixed prices, less the estimated carrying charges from May 26th, 1944 to the expected end of the War and of decontrol, is a proper measure for determining the just compensation to plaintiffs for the pepper in question, seized by the United States Army, and that plaintiffs-petitioners are therefore entitled to recover the full amount demanded in the Complaint, or $190,000, with interest, less the payment of $26,404.14, with interest.

5. In failing to find that the price at which plaintiffs-petitioners could have replaced the said pepper at the first opportunity for so doing was in excess of 50 cents per pound, and that such replacement cost measures the just compensation to which plaintiffs-petitioners are entitled, and that as said replacement value is far in excess of the amount demanded in the Complaint, plaintiffs-petitioners are entitled to the full amount demanded therein.

6. In failing to find that the price at which it was reasonable to estimate in May, 1944, Whole Black Pepper would have sold at that time had there been no War, is a minimum measure of just compensation to plaintiffs-petitioners, which said price was in excess of 20 cents per pound.

7. In failing to find that the net amount which plaintiffs-petitioner could have realized from the use and sale of its pepper as the foundation for synthetic or imitation pepper constituted a factor for determining just compensation and required an allowance therefor of at least 22 cents per pound.

8. In failing to find that the average cost of all of plaintiffs-petitioners' pepper at the time of the requisition here in question was 14.59 cents per pound, and that the average cost of the pepper actually requisitioned was 14.59 cents per pound, and that such amount, plus a fair profit, was in excess of 20 cents per pound, and that such amount constitutes a minimum measure of just compensation.

9. In finding in its 24th Special Finding as follows:

"The total cost of the pepper to Commodities is as follows:

	Pounds	*Per pound*	*Total cost*
Original cost	773,201.00	$0.0621046	$53,143.13
Shrinkage	13,450.12	.....	.....
Cost of pounds delivered in May 1944	759,750.88	.069948	53,143.13
Carrying charges:			
Labor, handling at (average) per bag of .04422			$256.71
Cartage, etc., at (average) per bag of .076			442.31
Storage, at (average) per bag per month of .03			19,591.62
Bank interest, commissions, cables, exchange, etc., amounting to approximately 2.75% per annum			13,672.99
Insurance, at premiums of approximately $4.368 per $100 value for 9 years 4 months			3,377.34
Taxes, on basis of average stored pepper during period 1936 to 1943 inclusive...			1,076.67
Total direct costs			91,560.77

Allowance for general administrative expenses at 1% per annum during carrying period, of 9.33% on original cost of $53,143.13	4,958.25
Total costs plus estimated administration expense, or an average cost per pound of $0.127	96,519.02

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs" (R. 21-22).

10. In failing to find that on the 26th day of May, 1944, there was no market in Whole Black Pepper in the United States and none had been offered during any month of the year 1944 prior to October, when the O.P.A. raised the ceiling price to 10¢ per pound.

11. In finding that the ceiling price of 6.75¢ per pound for Whole Black Pepper was approximately the fair market price as of December 11th, 1941 (Spec. Fdg. No. 10, R. 16) and in failing to find that such market was a depressed one.

12. In finding that between September 30th, 1943 and the date of the requisition on May 26th, 1944, very little Whole Black Pepper was sold out of these inventories (inventories of importers) (Spec. Fdg. No. 14, R. 18).

13. In failing to find that the pepper sold by Commodities and referred to in Special Finding No. 19 (R. 19), sold under pressure and was not a voluntary sale (See Opinion of the Court).

14. In failing to find that the pepper sold by plaintiffs at 16¢ per pound, mentioned in said 19th Finding, was sold under pressure and was not a voluntary sale.

15. In finding that plaintiffs offered to sell 1,000,000 pounds of pepper to the Army at 9¾¢ per pound, as found in Finding No. 22 (R. 20).

16. In finding that between January 1st, 1943, and November 8th, 1943, plaintiff, Commodities Trading Corporation, had sold 98,267 pounds of Whole Black Pepper at 6.5¢ a pound (Spec. Fdg. No. 22, R. 20), and in failing to find that said sale was not voluntary, but was under pressure.

17. In failing to find in connection with the facts found in said Finding No. 26 (R. 22-23), that it is seven years after planting before pepper vines produce at a normal rate, and in finding in said 26th Finding that the pepper vine has a bearing period of from ten to fifteen years, with an average bearing period of about eleven years, and in failing to find that the total bearing period does not exceed eleven years, and that the period during which normal production continues does not exceed seven or eight years.

18. In finding in said 26th Finding that new plantings would have begun to bear about 1945 or 1946, and in failing to find that there were no new plantings of any consequence subsequent to 1937 and prior to the Japanese invasion in the Winter of 1942.

19. In failing to give sufficient effect to the market price in British India, at the date of requisition, in finding just compensation.

20. In failing to give sufficient effect in determining just compensation to the "retention value" of plaintiffs' pepper, based upon what plaintiffs could actually have

realized for their pepper at the end of price control, if it had not been seized by the Government.

21. In failing to give sufficient effect in determining just compensation to what plaintiffs could probably have received for their pepper upon the end of price control, veiewed from conditions as they existed at the time of requisition.

22. In failing to give sufficient effect in determining just compensation to the price which would have obtained in the United States in May 1944 and on May 26th of that year, if there had been no War.

23. In failing to give sufficient effect in determining just compensation to the replacement cost of the requisitioned pepper.

24. In failing to give sufficient effect in determining just compensation to cost plus reasonable profit.

25. In giving effect in its determination of just compensation to plaintiffs' offer to sell to the Army, referred to in Special Finding No. 22 (R. 20).

26. In giving effect to Commodities' petition for an amendment of Price Schedule 52, referred to in Special Finding No. 21 (R. 19-20) in finding the just compensation for the requisitioning of the pepper here in question.

27. In receiving in evidence Defendant's Exhibits Nos. 2, 3 and 4, over plaintiffs' objections (Tr. 199, 201).

28. In refusing to receive in evidence the affidavits of Fletcher H. Long and Ralph W. Olmstead, forming a part of Joint Exhibit "K" in Paragraph 15 of the Stipulation of Facts between the parties.

29. In refusing to receive in evidence Plaintiffs' Exhibit No. 5 for Identification.

30. In finding that part of Finding No. 23 (R. 21) wherein the Court found the market price of Indian pepper at 20¢ instead of 20.99 for May 1944.

31. In failing to find that on or about March 10, 1944, the United States, acting through the War Food Administrator, requisitioned, or attempted to requisition approximately 3,964,800 pounds of Whole Black Pepper owned by plaintiff.

FIRST POINT.

All of the questions raised in the following points are matters which this Court can and should consider.

Points Second, Third and Fourth discuss the intent of the War Powers Act of October 16, 1941 and the amendment thereof and the Emergency Price Control Act with respect to the right of Commodities to hold its pepper until the end of the War and with respect to the effect upon the compensation provided for by the War Powers Act of a ceiling price fixed under the authority of the Emergency Price Control Act.

The Fifth Point shows that there was no U. S. market and is based on the findings.

The Sixth Point discusses the decision of this Court in the *Felin* case, and argues that that decision does not indicate an intent on the part of this Court to limit just compensation by a ceiling price, especially not where the property is not perishable.

All of the other Points are directed in part towards sustaining the right of the Court of Claims to award as just compensation an amount in excess of that which would be paid at the O. P. A. ceiling price.

All of the Points, except the Second, Third, Fourth, Fifth, Sixth and last Points, are also directed to showing

that the finding by the Court of Claims of a value of only 15 cents per pound, and its judgment based thereon awarding just compensation at that rate was in the face of and in conflict with its subordinate findings which required the allowance of the full amount of 22 cents demanded in the complaint.

This is a pure question of law.

This Court said in *United States* v. *Esnault-Pelterie*, 303 U. S. 26, *supra*, at page 31:

> "We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustainable."

The Court of Claims found the market value of Indian Pepper delivered in New York in May, 1944 (Spec. Fdg. 23, R. 21), retention value (Spec. Fdg. 25, R. 22; Spec. Fdg. 17, R. 18) imitation pepper with a ceiling price of 16 cents per pound, only one-quarter of which or less was real pepper (Spec. Fdg. 18, R. 18-19) and several other bases for just compensation, each one of which required an award of the full amount demanded in the complaint. These are all discussed *infra*. But, in the face thereof, the Court of Claims awarded only 15 cents per pound. This is explained in its opinion in which it says (R. 27):

> "Taking into consideration Commodities' costs and the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed, and also these sales at 10 cents, at 14.19 cents, and at 16 cents, we conclude that 15 cents a pound is just compensation. This allows plaintiff a little more than 2 cents a pound profit, and is 1½ cents a pound higher than

the average price at which pepper had sold over the last 75 years."

Commodities shows hereinafter that the 10, 14.19 and 16 cent prices were irrelevant and were erroneously taken into account and that its real cost was 20¢+.

SECOND POINT.

Commodities had the right and the opportunity to hold its pepper and to refuse to sell—certainly until it received a price that was fair.

The few facts referred to in this point which were not found are supported by the undisputed testimony and error was assigned for failure to find. (See assignments 35, 43.) The point and the facts are in support of an award above the ceiling price.

The Court of Claims found:

> "25. Whole black pepper is not perishable and will last unimpaired in quality for several decades" (R. 22).

The foundation of the Government's claim seems to be that Commodities, in time of War, had no right to continue to hold its pepper in the circumstances which had developed, but was obligated to sell it ,and to sell it at the ceiling price established by O.P.A. under the provisions of the Emergency Price Control Act passed January 30th, 1942. However, the very Act which the Government relies on provides in sub-division (d) of Section I, as follows:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

Moreover, this Court, in the *Yakus* and *Willingham* cases (321 U. S. 414, 321 U. S. 503), where *Yakus* and *Willingham* contended that the Emergency Price Control Act was unconstitutional and in violation of the Fourteenth Amendment of the Constitution because the ceiling prices fixed thereunder required owners of property to sell or rent at a loss, answered by referring to said Subdivision (d), and by saying that there was nothing in said Act or in any other law known to the Court, which compelled an owner to sell at a loss.* This must be the equivalent of not being required to sell at an unfair price.

Of course, the right of any owner is subject to the right of the Government to requisition for the defense of the country. In this case, the Government did requisition —under the provisions of the Act of October 16, 1941, as amended March 27, 1942. But this Act put safeguards around the seizing of private property even in times of War, and provided that just compensation must be paid therefor.

So just compensation must be determined by taking into account the restrictions on present sales, but also the right to retain and sell at some more propitious time.

Furthermore, by upholding the Constitutionality of the Price Control Act on the above ground, this Court confirmed the point that ceiling prices are not to be considered as identical with or as measuring true value or just compensation.

A taking of property is serious and compensation therefor is not to be determined by hasty Bureaucratic judgment fixing hundreds of ceiling prices in brief periods of time.

If any further confirmation of the above point is required it is furnished by the provisions for review of ceil-

*NOTE: The Government's contentions would force Commodities to sell at a great loss, at approximately only 50% of the cost as found by the Court, and less than 35% of the cost shown by Commodities.

ing prices by the Emergency Court of Appeals. An owner of property who considers that a ceiling price is too low and hurtful to him can get no redress by proving that fact. He can obtain a judgment requiring an increase in price only if he can show that the determination of O. P. A. was arbitrary or capricious.

Thus, subdivision (b) of Sec. 924, of U. S. C. A. Title 50 App. provides as follows:

> "(b) No such regulation, order or price schedule shall be enjoined or set aside in whole or in part unless the complainant establishes to the satisfaction of the Court that the regulation, order or price schedule is not in accordance with law or is arbitrary or capricious."

It has been held in a number of cases brought in the Emergency Court of Appeals that the Court may not substitute its judgment for the judgment of the Administrator (*Madison Park Corporation* v. *Bowles*, 140 Fed. [2d], 316). But as shown in the Third Point, *infra*, this Court, in the *Cors* case, held that just compensation was a matter concerning which a person whose property had been taken had a right to a judicial determination.

In this connection it is proper to point out that Commodities was no War Profiteer but sold eight million pounds, nearly one-third of all of its pepper, in the face of the prospect of war (Spec. Fdg. 5, R. 13-14).

The above matters are all discussed more at length in one or more of the following points, but are here stated briefly to destroy the Government's argument that because it was Wartime, Commodities had no right to hold its property until it could get a fair price for it and had no right to get a fair price for it when requisitioned. Six and one-half cents does not seem to be a fair price

for a commodity which was selling for $2.00 in countries where there were no restrictions (R. 78-79).

In this connection it may be proper to point out that pepper is not a necessary food, or a food at all but is merely a condiment and a luxury. Its use is so small, only ⅛th of one pound per annum per person in the United States (R. 49-50) that to claim that its use for civilian consumption was in any way important to the conduct of the War and that the regulation of its price was in any way important to avoid inflation was just ridiculous. It was so held by the United States District Court of the District of Columbia in case No. 23573 brought by Commodities Trading Corporation to enjoin the requisitioning by Federal Surplus Commodities Corporation and officials of the Department of Agriculture of 22,000,000 pounds of pepper in March, 1944, which included nearly all of the pepper in the United States at that time (Stipulation, R. 130 and R. 131).

THIRD POINT.

An analysis of the language of the Act of October 16, 1941, the Emergency Price Control Act of January 30, 1942 and the Act of March 27, 1942, amending the October 16, 1941 Act, clearly shows that it was not the intent of Congress to permit the taking of private property at a bureau fixed price, but, on the contrary, it was the Congressional intent that requisitioned property should be justly compensated for in accordance with rules previously laid down by this Court.

The following discussion is somewhat repetitious of the first point but goes into the question more deeply. As stated in the foregoing point Commodities has invoked the aid of the Act of October 16, 1941, as amended, and is proceeding thereunder. The United States has contended that the Emergency Price Control Act limits, in fact if

not by its terms, the recovery to which Commodities is entitled. Two following considerations answer the Government's contention:

(a) This Act was passed in wartime and only a few months after the October 16th Act. But no exception is made in favor of the Government of the United States with respect to the provisions of sub-division (d) of Section I quoted in Commodities' First Point as follows:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

Indeed no reference whatever is made in the Act to the requisitioning of private property or to the October 16th, 1941 Act.

Both the said Act of October 16, 1941, and its amendment enacted on March 27, 1942, Chapter 199, 56 Stat. 181, provide that the Government, under certain circumstances, may requisition property, for which property, however, the Government is directed by the language of each of those Acts to make just compensation to the owner, as required by the Fifth Amendment to the Constitution of the United States. Nothing whatever is said in either about limiting said "just compensation" to prices determined under the power granted by the Emergency Price Control Act. In fact, no reference is made in the said amended October 16, 1941 Act to the Emergency Control Act, which had been passed only a few weeks before. Those three acts each conferred broad powers over private property, and if any one of them had been intended to have any effect upon any other, some reference thereto would have been made.

It was said by Mr. Justice Jackson in the *Felin* case that War does not suspend the Constitution. While that

was in a dissenting opinion, no member of this Court has taken issue therewith, so far as we know.

However, the property here in question was not seized under any general powers invoked by reason of a state of War, but was requisitioned formally under the said Act of October 16, 1941 as amended.

As Congress clearly intended that no one should be compelled to part with his property at ceiling prices fixed under the Emergency Price Control Act, it would be a plain violation of that intent if the Government could compel an involuntary sale through the instrumentality of a requisition and limit the owner's compensation to the ceiling price.

(b) As above stated, the War Powers Act of October 16, 1941, which was passed in peacetime, but at a time when War looked possible, if not probable, provided for the requisitioning of property in peacetime as well as in War, and provided for the payment of just compensation for requisitioned property, in accordance with the requirements of the Fifth Amendment to the Constitution of the United States. It made no distinction between requisitions made in peace and those made in wartime. However the Act contained a provision that such property should be paid for *"on the basis of the fair market value of the property at the time it is requisitioned."*

Within two months after the passage of the Price Control Act, the Act of October 16, 1941 was amended by the Act of March 27, 1942, as above stated. The amended Act, while conferring the same power to requisition, and containing the same provisions with respect to the payment of "just compensation", in accordance with the Fifth Amendment to the Constitution, omitted, however, the phrase *"on the basis of the fair market value of the property at the time it was requisitioned"*, contained in the Act as first passed.

Congress realized that the retention of the above phrase, after the passage of the Emergency Price Control Act, might lead to complications and attempts to get away from the plain requirements of the Fifth Amendment to the Constitution. It wished to avoid claims such as those actually made herein by the Government; namely, that in determining the just compensation provided for by the Act of March 27, 1942, a bureau-fixed ceiling price which would be, of course, the only legal market price, might be substituted for a judicial determination based on relevant facts and made according to well established precedents.

The foregoing taken in connection with the First Point seems to require an overruling of the claims of the United States with respect to the alleged errors made by the Court of Claims and specified by the United States in its assignment of errors as:

> (1) In failing to hold that the maximum price in effect at the time the pepper was requisitioned, validly established by the Office of Price Administration, was the proper standard of just compensation therefor.
>
> (2) In holding that the determination of just compensation in time of war or national emergency must take into account "the plaintiff's right to hold its property until restrictions on its disposition are removed" and "his right to hold his property until he can get for it whatever any one is willing to pay."
>
> (3) In fixing as just compensation for the pepper requisitioned an amount in excess of the maximum price therefor at the time of the requisition, as fixed by the regulations of the Office of Price Administration.

And Commodities submits that the maximum price established by the Office of Price Administration shou' ' not be

held to measure just compensation in any case where the requisitioned property was not perishable and could as a practical matter have been held until after price control had ended.

Whether or not this Court agrees that the maximum price should not control in *any such case* the following points will show that the maximum price should not be controlling or even relevant in this case and that the United States could hardly have selected a poorer case for testing out its broad claims with respect to the effect of ceiling prices.

FOURTH POINT.

The case of United States v. Cors, 337 U. S. 325, which was relied upon to a substantial extent by the Government in its briefs upon the two applications for certiorari in this matter, does not support its contentions, but does state certain fundamental rules supporting Commodities.

While the facts of the *Cors* case are so different from those in the case at bar that the decision has no direct application here, and while that was a five to four decision, there were two fundamental rules of law stated therein which do have application here, and upon which all members of the Court seemed to be in agreement. They were:

> *First*: That the determination of just compensation under the Fifth Amendment of the Constitution is a matter for judicial determination; that it cannot be changed by Act of Congress, and that the previous interpretations thereof by this Court must stand.
>
> *Second*: That market price should not be a fetish.

Commodities interprets the above to mean that the determination of just compensation in this case must be

made by this Court's taking into account all relevant factors showing what Commodities lost by reason of the taking of its property, and that such factors should be considered and dealt with in accordance with the previous determinations of this Court, free from restraint by any Acts of Congress or by the single circumstance of a market price, if one existed.

FIFTH POINT.

There was no free market in the United States for whole black pepper after a ceiling price was fixed and no market at all from prior to January 1st, 1944 until after October of that year.

The few facts referred to in this point which were not found are supported by the undisputed testimony and error was assigned for failure to find. (See assignments 35, 43.) The point and the facts are in support of an award above the ceiling price.

Upon the above point the Court of Claims found:

> "15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions" (R. 18).
>
> "18. During the years 1943 and 1944, which was during the period of shortage of pepper and de-

mands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agents.

"This imitation pepper sold for approximately 16 cents a pound.* During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound" (R. 18-19).

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October. Prior to increasing the ceiling price, the Office of Price Administration and the Department of Agriculture had obtained an informal agreement from Commodities to sell about seven million pounds of its pepper at the 10-cent price, and after the price was so increased in October 1944 Commodities did sell approximately seven million pounds of pepper at that price (R. 19).

"In March 1946, following similar negotiation between Commodities and the Government, the ceiling price of whole black pepper was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of pepper, amounting to about three million pounds, at that price (R. 19).

"These increases were made in order to obtain a distribution of pepper which was not obtainable at the lower ceiling prices, and were made only after negotiations by the Office of Price Administration

*This was an O.P.A. ceiling price.

with Commodities and other dealers in pepper, to the end that large quantities of pepper would be sold upon such increase in ceiling price" (R. 19).

The above findings show definitely that there was no market at the time of requisition or for five months prior and five months thereafter.

This, Commodities submits, shows that market value based on ceiling price, does not enter into this matter and distinguishes this case from those cited to this Court and to the Court of Claims by the United States.

However as the United States has sought to emphasize sales some two years prior to May 1944 and after a ceiling price was fixed Commodities will show the facts and findings as to those matters.

The Court of Claims found:

"11. During the period immediately subsequent to the issuance of the price schedule of 6.75 cents per pound, and prior to February 3, 1942, prices for Lampong type whole black pepper did not reach 6.75 cents per pound, the price established as the maximum by the price schedule. During the month of January 1942, for example, the highest daily price was 6.45 cents per pound, with the average for the month of 6.41 cents per pound. These sales were made by certain traders in pepper, importers, and grinders, particularly those who held smaller lots because they realized it would be impossible for them to obtain a greater price than the ceiling, and therefore they sold rather than hold the pepper indefinitely and incur the cost of holding. There were large stores of whole black pepper in the country at the time of the imposition of the 6.75 cent ceiling price" (R. 16).

and in "15", it found as above quoted:

> "15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impractical because of war conditions" (R. 18).

The prices obtained on these sales were, moreover, depressed prices, depressed by reason of the effect of the ceiling price itself as stated by the Court of Claims in Finding 11 and by the following facts, among others:

> The dumping of pepper on the New York market by the War frightened East Indians; the hostile attitude of the Government, as represented by Mr. Leon Henderson, who criticized the purchases of pepper and required the New York Produce Exchange to quadruple its margin requirements; and the piling up in the United States in the hands of importers and traders of nearly 100,000,000 pounds of Whole Black Pepper (R. 89-90, 108-109, Spec. Fdg. 8, R. 15).

Whatever may be said of the importance of the market in 1942, seldom would a market in 1942 be proof of market value two years later. However, in the present case, a tremendous change between 1942 and 1944 was definitely shown, which would make it ridiculous to claim that the

market in 1942 was any proof of 1944 value. Thus, the 100,000,000 pounds of Whole Black Pepper held by importers in March, 1942 (Spec. Fdg. 8, R. 15), which was practically all of the Whole Black Pepper in the world (R. 45), had been reduced to 30,000,000 pounds by September, 1943 (Fdg. 14, R. 18). This reduction had taken place despite the fact that rationing had been brought down by degrees prior to May 1944 to only 40% of normal prewar consumption (Fdg. 13, R. 18).

Moreover, the undisputed expert testimony showed that pepper would have sold for more than 80 cents a pound in New York in May 1944, despite the rationing, if there had been no ceiling price (R. 60), and that it was actually selling at that time for as much as $2.00 a pound in countries where there were no restrictions (R. 79).

In addition, between March 1942 and May 1944, the Japanese invasion of Sumatra had taken place with great and lasting damage to pepper plantations and pepper production (R. 46, 102).

SIXTH POINT.

Whole Black Pepper is not Perishable but Lasts Indefinitely and is Easily Stored. The Reasoning of no one of the Justices of this Court in the Felin case* has any application to the Case at Bar.

The few facts referred to in this point which were not found are supported by the undisputed testimony and error was assigned for failure to find. (See assignments 35, 43.) The point and the facts are in support of an award above the ceiling price.

On the above point the Court of Claims found as above shown:

> "25. Whole black pepper is not perishable and will last unimpaired in quality for several decades" (R. 22).

*United States v. Felin & Co., 334 U. S. 624.

As above stated it is not of importance as an article of food and the average annual consumption in the United States is only one-quarter of a pound per person per year including that used by meat packers and sausage makers (Tr. 26). Whole black pepper is easily stored and plaintiff could have held its pepper until the end of the war at an overhead of only approximately one-half of one cent per pound per year, as found by the Court of Claims (Fdgs. 21 and 24, R. 19-20, 21-22).

This Court in the *Felin* case, above referred to, by no means held that the ceiling price was the measure of just compensation, particularly where the property taken was not perishable.

The majority opinion reversed the Court of Claims upon the ground that its finding of fact with respect to the cost of replacement was not sustained.

In a concurring opinion Mr. Justice Reed with whom Mr. Justice Black and Mr. Justice Murphy concurred, said: "* * * I believe that whenever *perishable* property is taken for public use under controlled-market conditions the constitutionally established maximum price is the only proper standard of 'just compensation'" (p. 643). He later said with respect to the effect of the ceiling price:

> "It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less

> severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of 'just compensation.' That lawfully fixed market price determines what the perishable article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is 'just compensation' " (pp. 645-6).

Throughout this opinion stress is put upon the fact that the property seized was *perishable*.

The opinion of the Court of Claims includes the above quotation, and italicizes therein the word "perishable" wherever it occurred. It will be seen that said word occurred four times in the short excerpt.

On the other hand, Mr. Justice Jackson, with whom Mr. Justice Douglas concurred, states as follows:

> "It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Gov-

ernment itself, for the long-range success of price controls, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property.

"The war did not repeal or suspend the Fifth Amendment. *United States* v. *New River Collieries*, 262 U. S. 341, 343; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. But it is obvious that the constitutional guaranty of just compensation for private property taken for public use becomes meaningless if the Government may first, under its 'war powers,' fix the market price and then make its controlled figure the measure of compensation" (pp. 651-2).

The Justices who took the view that the ceiling price did measure just compensation *where the property taken was perishable* did so, upon a practical and realistic view of the situation, holding that because the owner had to sell perishable property and could not sell above the ceiling price, the ceiling price measured all that he could get and therefore all that he lost when his property was taken. The three Justices, however, who joined in the prevailing opinion, apparently disagreed with the view taken by Justices Reed, Black and Murphy.

Thus, in the prevailing opinion, Mr. Justice Frankfurter stated:

"We are not passing on the abstract question whether a lawfully established maximum price is the proper measure of 'just compensation' whenever property is taken for public use. We are adjudicating only the precise issues that emerge from this case" (p. 630).

As the issue presented to the Court concerned perishable property the whole question might easily have been determined and the same result reached, by a brief and simple route,—instead of by a laborious analysis of the facts, if a majority of the Court had agreed with the view of Mr. Justice Reed, above stated. It is plain therefore that those justices were not ready to accept the thesis that ceiling price measures just compensation even where the property taken is perishable.

The ninth Justice, Mr. Justice Rutledge, concurs in the result and agrees in part with the prevailing and concurring opinions, but, on the precise subject here under discussion, he says:

> "It may be, as my Brother Reed and those who join with him think, that the ceiling price in a War-time controlled market should furnish the measure of Constitutional just compensation for the property of a highly perishable nature" (p. 647).

The Justice, however, rested his decision upon the failure of Felin to sustain the burden of proof of replacement cost.

Other facts in the case at bar, beside the lasting quality of pepper, are entirely different from those which impelled the conclusions of Mr. Justice Reed. Thus, he says:

> "It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction" (pp. 645-6).

This is a powerful argument in favor of the view taken by those Justices, but it has no relation to the question here presented and to Commodities' property.

The opinion of the Court of Claims states as follows:

> "This so-called retention value is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper. It was rather an investor in pepper. It began accumulating pepper in 1933 and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it. * * * Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition" (R. 40).

While the above is quoted from the opinion and the Court of Claims made no findings to cover the situation, the facts proven fully covered the same (R. 52-53, Tr. 32-37, Spec. Fdg. 5, R. 14). Requests to find those facts were made to the Court of Claims and the failure of the Court to find such facts is raised by petitioner's assignment of errors with respect to such failure (Assignment of Errors 13, 14, 20 in Petition, pp. 15-16).

Hence, the objection of "economic hibernation or extinction" does not apply to Commodities which was not a dealer in pepper, did not have to sell and did not even wish to sell.

Thus the situation of Commodities and that of the Felin Co. were as far apart as the poles.

Moreover, the limitation of the ceiling price was suggested upon the practical ground that as *Felin* could not

have obtained more than the ceiling price upon a sale and as he had to sell his perishable property he did not suffer a loss in excess of the ceiling price when his property was requisitioned.

However, here again Commodities' situation was entirely different. In May, 1944, it had many outlets for its pepper in excess of the 6½¢ ceiling price as shown in the following point.

SEVENTH POINT.

The regulations of O. P. A. themselves afforded to Commodities Trading Corporation, and other importers, many opportunities to sell their pepper in May 1944 at prices far in excess of the 6½¢ general ceiling price. This fact constitutes another direct distinction between the case at bar and the Felin case and also a basis for determining value in excess of 22¢ per pound.

The foundation of the argument set forth in the quotation from the Opinion of Mr. Justice Reed in the *Felin* case was not only that Felin had to sell his perishable property but that he could not obtain therefor more than the particular ceiling price in question.

In the case at bar, plaintiffs proved numerous opportunities afforded by the O.P.A. Regulations themselves for the sale by Commodities of its pepper at prices far in excess of the said general 6½¢ price. These instances included the following:

(a) *Use of its pepper for the making of synthetic or imitation pepper and the selling of same at an O.P.A. ceiling price to return from 25 to 30¢ a pound for the pepper* (Spec. Fdg. 18, R. 18-19).

(b) *The sale of its pepper in less than one bag lots.*

(c) *Sales to Porto Rico, Hawaii and Alaska at special O.P.A. prices far in excess of the 6½ cent price* (Fdg. 20, R. 19, O.P.A. Price Regulation 52, Tr. 154).

(d) *Sales to South America at prices far in excess of the New York selling price.*

(e) *Grinding the Whole Black Pepper and selling it at 12 cents a pound, the ceiling price for ground black pepper.*

Considering more in detail the above outlets for Commodities' pepper in excess of the 6½ cent ceiling price:

(a) *Synthetic or imitation pepper.*

On this point the Court of Claims found as above quoted:

> "18. During the years 1943 and 1944 which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.
>
> "This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound • • • " (R. 18-19).

The cost of grinding Whole Black Pepper was only a fraction of a cent per pound (R. 106).

The Court can take judicial notice that parched corn, wheat and cotten seed hulls are cheap ingredients. Thus, one thousand pounds of ground pepper mixed with three thousand pounds of these cheap adulterants could be sold in bulk at an O. P. A. ceiling price of $640.00. If only half of this is attributed to Whole Black Pepper, 32¢ would be realized for each pound thereof. There would have been little or no cost of selling (R. 106).

It sold for 16¢ or better (R. 106).

The 16¢ price was an O.P.A. ceiling price (R. 106, 107). But in any case if Commodities could sell for that much its pepper was worth that much.

They were paying $2.00 a pound for it in much poorer Countries (R. 72).

(b) *Sales in less than one bag lots.*

Whole Black Pepper in hands of bulk dealers, in which class was Commodities Trading Corporation (see F. D. O. 19), could be sold in quantities less than one bag (150 lbs.), free from restriction of said ceiling price (see Regulation 52 of the O. P. A.).

The said F. D. O. 19 put restrictions and limitations upon sales and established quotas, and Commodities understands that the War Food Administration contended that bulk dealers in which class said F. D. O. puts Commodities were subject to those restrictions, even though they are applied specifically only to packers and grinders and other receivers of pepper. As they had no quota, it was contended that they could not sell generally.

However, said F. D. O. 19 provides as follows:

> "(2) Any person may, without charge to his quota, deliver or accept for delivery any restricted spice to any of the following persons, or may use any restricted spice in the manufacture or processing of any product to be so delivered, or for replacing in his inventory any restricted spice so delivered or used:
>
> "(i) The Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any other governmental agency designated by the Director, or any agency of the United States Government for supplies to be delivered to, or for the account of, the Government of any country pursuant to the

Act of March 11, 1941, entitled 'An Act to Promote the Defense of the United States' (Lend-Lease Act).

"(ii) The American National Red Cross or the United Service Organizations, Inc.

"(iii) Any person operating an ocean-going vessel engaged in the transportation of cargo or passengers in the foreign, coastwise, or intercoastal trade, for necessary supplies for such vessel."

The cost of those sales would have been negligible (see testimony of Government's Witness, Squires, Head of Spice Division of O. P. A., R. 106).

(c) *Sales to Porto Rico, Hawaii and Alaska.*

A further opportunity to sell for prices far in excess of the said ceiling price was furnished by the Regulations of O. P. A. with respect to sales to Porto Rico, Hawaii and Alaska (Fdg. 20, R. 19). An entirely different method of measuring ceiling price in sales of that kind was provided from sales in Continental United States. The ceiling price was either 10% above the O. P. A. ceiling price in Continental United States, plus 125% of the prewar percentage markup or cost plus a percentage (O. P. A. Price Reg. 52, R. 103).

As Commodities had paid much more than 6½¢ for some of its pepper, and as its mark ups on foreign sales had been substantial, the above rules gave it an opportunity to sell at prices more than double the ceiling price, and plaintiff did in fact sell substantial quantities of pepper to Porto Rico for 14.19¢ per pound (Fdg. 20, R. 19; R. 90-92).

While these sales were made in 1945 and after the ceiling price had been increased to 10¢ per pound, the same opportunity to sell at the same price existed in May 1944, as those sales were made on the basis of cost plus allowance of export profit.

(d) *Sales to South America.*

A still further opportunity to Commodities and others to sell for prices far in excess of said 6½¢ ceiling price was furnished by the O.P.A. Regulations with respect to sales to foreign countries. These were substantially the same as the sales to Porto Rico, Hawaii and Alaska, but in this case the opportunity to sell was not unrestricted as in the case of those sections of the United States, but export licenses were required (R. 71). However our Good Neighbor Policy required the United States to share its dwindling supply of pepper with South America, and export licenses were issued to many holders of Whole Black Pepper, including Commodities, which was allowed to fill orders from Argentina for 35,000 pounds at the equivalent of 21¢ a pound* (R. 41, 70-71, 90-92).

(e) *Sales of ground pepper.*

Dealers in the same classification as Commodities had the opportunity of grinding their Whole Black Pepper and selling it for the ceiling price of 12 cents and more per pound (R. 45, 6). The grinding cost was but ½ cent a pound (R. 106) and the selling price was negligible, as the Government's witness, Squires, testified that a line would form in front of the premises of any person who could sell ground black pepper lawfully at 12½ cents a pound (R. 106).

Thus, it is seen that the whole foundation for the opinion of Mr. Justices Reed, Black and Murphy in the *Felin* case is entirely lacking in the present case, as there were many opportunities for plaintiff, Commodities, to sell far in excess of the ceiling price. Therefore the value of its pepper to it was much more than 6½¢ and it suffered a loss of much more than 6½¢ through the taking thereof by the Army.

*The actual price obtained for this pepper was 30.93c to 32.31c per pound for white epperr, but black pepper may be transformed into white pepper by the removal of the outer shell and at a total cost, including such loss, of 1/3 (Tr. 120-121).

EIGHTH POINT.

The Market Price of Indian Pepper was a measure of the value of Commodities' pepper and fully Sustains an Allowance of at Least 22¢ a Pound as Just Compensation for Commodities' Pepper Requisitioned on May 26, 1944.

The Court of Claims found with respect to the above:

"Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight and to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, *i. e.*, 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper" (Spec. Fdg. 23, R. 21).

There is no difference in value between Indian pepper and plaintiffs' pepper (R. 39).

There was a free market in India in that there was no ceiling and the Indians could trade with each other freely (R. 64). There was a depressed market, however, because the British Government had put restrictions upon the exportation of pepper from India (R. 41-42, 46-47, 63-64, 61, 81). Otherwise, the price would not have been 21¢ delivered in New York and the price in South America $2.00 (R. 41-42, 79).

By May 1944, Commodities owned approximately 60% of all the pepper left in the hands of importers in the United States, and all the import pepper was concentrated in a few hands (Spec. Fdg. 14, R. 18). There was a loud public clamor for pepper in the Press and in Congress, and the fact that in these circumstances O.P.A. refused to permit the American public to supply itself with pepper at an import cost of less than 4¢ per individual per annum (R. 61-65), by letting in the Indian pepper, shows that there was a definite determination on the part of O.P.A. to force the liquidation at low prices of the pepper held by importers in the United States before letting in this Indian pepper.

It is not important whether this was a proper or improper action on the part of O.P.A. The real question is:

Can the Government prevent trading and a market in the United States and then reject the prices in India which would have prevailed here as evidence of value?

While Indian pepper was not imported in the year 1944, it was in 1945. O.P.A. permitted the Commodity Credit Corporation to buy 300 tons of Indian Pepper and pay the full market price of 23½¢ per pound (R. 47). This was enough pepper to supply every man, woman and child in the United States with the average consumption for a fortnight (R. 50). That pepper was sold by Commodity Credit Corporation to exporters in New York (the classification in which Commodities Trading Corporation was placed), at cost and was sold by them to South Amer-

ica for as much as $1.00 a pound. All with the permission of O.P.A. (R. 47-48). There was no change of conditions between 1944 and 1945 (R. 48).

In addition the Army recognizing the impropriety of making requisitions against the short supply in the United States while there were large untouched supplies available in India, arranged to purchase through Commodity Credit Corporation many hundred tons of this Indian Pepper, which it handed over to the grinders in the U. S., who ground it and packed it in regulation packages for the Army (Tr. 24, 25). That pepper was bought by the grinders at between 21¢ and 23¢ a pound (Tr. 22-24). Finally, at the end of the War, and during control, several hundred tons of this Indian pepper was brought into the U. S. by the Department of Agriculture, which permitted grinders to buy the pepper and to sell it for civilian consumption in the U. S. That privilege was restricted to grinders (Tr. 24-25). Thus there was an actual market in Indian pepper in 1945.

The Indian market price is stated in Finding 23 as May 20¢, June 20.99¢. The May price is an error, probably typographical. The testimony upon which the finding was based was "May 20.99 and June same price" (R. 42). This is the cost delivered at the dock. It must then be handled, carted and stored (Commodities' assigned errors to above finding, No. 30, p. 17, *supra*).

NINTH POINT.

Plaintiffs' claim of 22¢ per pound is only what Commodities could reasonably have realized in May 1944 had no war intervened, and just compensation should not be fixed at any lesser price.

The War caused great destruction of pepper and pepper gardens and cut off Sumatra from the rest of the world (R. 45). This caused a great permanent increase

in the actual value of pepper, and a rise in price, where uncontrolled, to nearly ten times that claimed by Commodities herein (R. 62) and more than thirty times the O.P.A. ceiling price. Would it not be a travesty upon justice if in these circumstances just compensation for Commodities' pepper should be fixed at an amount less than it could have obtained, had there been no War?

With respect to the above the Court found:

> "If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (Spec. Fdg. 26, R. 22-3).

While the Court did not find the amount of the increase in price referred to above and while no witness stated it in cents per pound, the evidence and findings show that any reasonable estimate would put the total price above 20¢ in May 1944.

Thus, in addition to the portion of Finding 26, quoted above, we have the following:

(1) The graph found in Finding 9 (R. 16) which shows the history of pepper prices for seventy-five years before the War. This shows that for 75 years every time pepper prices fell below 6 or 7 cents, they soon climbed back to above 15 cents, and usually to from 20 to 40 cents and that there was great regularity in the cycles—about 7 years from bottom to top and seven more to bottom again.

So long and so regular a succession of cycles by itself showed a high probability of repetition in the future.

(2) In Finding 26 (R. 22-23), the reason for the cycles was shown as follows:

> "The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines.
>
> "The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942."

The conclusion in the finding above, that it was probable that production of pepper in Sumatra would have decreased each year after 1941 until about 1945 or 1946 is a great understatement. Humanly speaking, it was inevitable.

As the Court of Claims found in said Finding 26, the pepper vine does not produce at all until four years after planting and continues to bear only eleven years after that. So in 1941 all of the pepper vines which had been planted 14 or 15 years previously, as a result of the abnormally high prices, of 1926 were dying of natural causes, and each year vines which had been planted in later years would die. Continued new plantings were always required to maintain a supply of pepper (R. 99-100). There were no new plantings from 1937 up to the time of the Japanese invasion in March 1942 (R. 101-102).

(3) In addition an important dealer who had been familiar with the pepper market for 20 years testified that in 1941 the price of pepper was on its way up and that he knew of no reason why pepper prices should not follow the form of the usual cycle and that by 1944 they would have been in his opinion in excess of the average price, and well on the way to another top (R. 81).

Pepper prices had actually increased from a price of 4.1 cents a pound in January to 6.75 cents per pound by December of that year (Spec. Fdgs. 9 and 10, R. 15-16).

While the Findings of the Court of Claims are probably sufficient to support Commodities' claim in this point, the proof was much stronger than the findings, and Commodities in its Petition for Certiorari, assigned as errors the failure of the Court to find in accordance with the evidence, and, to a certain extent, against the evidence (Assignment of Errors 17 and 18).

For instance, the Court makes no distinction between the time when the pepper vine begins to bear at all and the time when it begins normal production. All of the witnesses, including the witness Squires, former Chief of Spice Division of O. P. A., called by the United States, testified that it was seven years and not four years before there was any considerable yield from the new pepper vines (R. 107).

Thus, instead of there being "a decreased supply during the period from 1942 to 1945 or 1946", only such decreased supply would have continued until 1949.

This Court can take judicial notice of the fact, so commonly known, that the wholesale price of pepper has been approximately one dollar, for most of the period following decontrol, due to this very fact.

Furthermore, the Court of Claims assumed that there would have been plantings of new pepper vines in 1942, if there had been no war. There was no justification for this whatever, as there had been no plantings of new pepper in 1941 or 1942, up to the time of the Japanese invasion

in March of that year (R. 101-102). Moreover a price below 7¢ has usually checked planting over the 75 year period shown on the graph in Finding 9 not stimulated it (R. 16, 81).

With all the wealth of information and statistics at the command of the Government, not one word of evidence was introduced in contradiction of any claims made by Commodities.

As the Attorney-General below argued that the war was a boon to Commodities, and pointed out the 78 million to 100 million pounds of pepper which was held by United States importers in March 1942 (Spec. Fdg. 8, R. 15), and will doubtless repeat such argument, it may be proper to point out at this place that the United States stock was nearly all of the pepper that there was in the world in March 1942 (R. 45) and had been reduced to 28 million pounds by September, 1943 (Spec. Fdg. 14, R. 18). This 28 million pounds was much less than one year's supply for the United States (R. 89) and only about a three months' supply for the world (R. 68). Moreover, the above mentioned great reduction in stocks had taken place between March 1942 and September 1943, despite the fact that rationing was imposed upon pepper dealers at an early period, and the severity thereof was steadily increased until the quota was reduced to 40 per cent. of prewar consumption by the first quarter of 1944 (Spec. Fdg. 13, R. 17-18).

The undisputed evidence showed that pepper was an expensive and troublesome vine to plant in the first instance, and that it required continuous care and fertilization throughout its life (R. 98-99).

In order to start a pepper garden, a space must be cleared in the jungle. A special kind of tree must be obtained from another portion of the jungle and transplanted to the clearing. The pepper vine is then planted near the living tree and climbs up upon it. If constant care is not exercised, the jungle will reclaim the area taken from it.

The large production spoken of by the Court of Claims in the above quoted finding had the effect of depressing the price from 42¢ down to 3 cents a pound, the lowest known to modern history. This put a stop to practically all plantings in 1937, 1938, 1939, 1940 and 1941, and brought about the abandonment of a number of producing gardens (R. 43, 66-68, 101-102). So great was the effect of this that the 1941 crop was 40% smaller than the average crops of the immediately preceding years (R. 100).

The failure of the Court of Claims to find in accordance with the above Commodities assigned error.

TENTH POINT.

Retention value is a fair and reasonable measure of just compensation for requisitioned non-perishable, easily stored property, where the cost of holding and future market price can be foretold within reasonable limits.

The Court of Claims in its opinion said:

> "This so-called retention value is particularly applicable in this case" (R. 25).

Retention Value is the value at the time of taking, based upon reasonable probabilities as to the future and as to what the market will be following decontrol. It is by no means the actual price which has followed decontrol. On that basis, petitioners would have received an award of 50 to 60 cents per pound instead of 15 cents (Spec. Fdg. 17, R. 18).

Retention value does not reflect the extreme scarcity resulting from war demands or war restrictions. On the contrary it is measured by the conditions which will exist when that scarcity has ceased, and normal conditions have been so far restored that price control is ended.

That the Court of Claims had the above conception of retention value and not the fantastic one stated by re-

spondent in its briefs to this Court on the application for certiorari is clearly shown by its opinions in *Kaiser* v. *United States*, 69 Fed. Supp. 555, and *Pantex Pressing Machine* v. *U. S.*, 71 Fed. Supp. 859.

In *Kaiser* v. *United States*, in applying retention value as the measure of just compensation, the Court said:

> "Plaintiffs, but for the requisition, could have held the material in stock for use in the manufacture of their products after the emergency had passed and priorities had ended, but this would have entailed capital tie-up, expense of storage and possibly some deterioration and obsolescence."

Thus, the Court of Claims clearly explains that retention value as considered by it was restricted to the value "after the emergency had passed and priorities had ended" and that capital tie-up, storage, deterioration and obsolescence should be considered as deductions.

After the above-quoted statement, the Court of Claims continued as follows:

> "These and other existing factors must be taken into consideration in arriving at the fair and reasonable value of the stock *at the time of taking.*"

This statement flatly refutes the contention of the Government that retention value violates the principle that it is the value *at the time of taking* which must be considered.

In *Pantex Pressing Machine* v. *United States*, the Court of Claims stated:

> "• • • nevertheless, when it (the Government) takes a person's property it must compensate him in the light of his right to retain his property, unless requisitioned, until the restrictions on its use and disposition should be removed. • • • From the

total there must be deducted an estimated amount for carrying charges for the estimated period during which the restrictions would remain in effect."

From the above it seems plain that retention value is a proper measure to apply for the ascertainment of just compensation in this case if the facts indicate within reasonable limits what the prices of pepper would be after the end of price control, how far in the future it was reasonable to anticipate that end to be, and the carrying charges of pepper from May, 1944 until such time of decontrol. As to what could be expected at the end of price control, we have the following.

The Court of Claims found:

"17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months" (R. 18).

But this is hind sight, and in May, 1944 no one *knew* what the prices would be at the end of price control. However, the evidence and the findings show that a price in excess of 25 cents to 30 cents was a reasonable prediction at the time of seizure.

Thus, the Court of Claims found (Fdg. 16, R. 18):

"There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this

commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol."

As already stated, there was in May, 1944 a price of $2.00 per pound in certain countries where there was no price control, and the expert evidence was that even in spite of restrictions imposed by the rationing orders, the price in the United States would have been 80 cents to $1.00 per pound if no ceiling price had been imposed.

The shortage of pepper, due to the voluntary cessation of planting and the voluntary abandonment of pepper gardens in 1941 and prior years discussed in the preceding point, increased by the destruction following the Japanese invasion, made it certain that the end of the War would find the whole world with an acute shortage of pepper.

As shown by the graph, commented upon in the preceding point, whenever there was even a slight shortage of pepper there was a trebling or quadrupling of the prices.

Another important factor in connection with the price movements of pepper subsequent to December, 1941, is the fact that the price of pepper has little or no effect upon its consumption, contrary to what happens in the case of nearly every other consumable material. This is due to the fact that only one-eighth of one pound of pepper is the normal per capita annual consumption, and few people would be influenced by an increase from 6 cents to 60 cents per pound, where the consumption is so small.

From all of the foregoing, it is clear that while no one could predict exactly the price of pepper at the end of the War, and at the end of price control, it was obvious that that price would be a high one and far in excess of the price asked for in the case at bar.

As to the length of time that an owner of pepper would have to hold it from May 26, 1944 to the end of the War,

we have the fact that the end of the War was well in sight at that time. Both Germany and Japan had begun to crumble and Italy was done for. The English had repelled the threat to Alexandria and had driven the Germans back in North Africa. We had landed in their rear and a large part of the German-Italian Army had been captured. We had proceeded Northward in Italy and had nearly reached Rome, which fell a few days after May 26, 1944. Our airplanes, in connection with the English, were creating havoc in the German manufacturing centers. The Russians had repelled the great German invasion and had captured an entire German Army in front of Stalingrad. General McArthur and our Navy were conducting a most successful campaign in the Pacific.

It was obvious that the War would end in a year or so and that control of most prices, particularly a luxury condiment used in such small quantities as pepper would end within two or three years at the outside.

As to the cost which a holder of pepper would incur in connection with retaining such property until the end of price control, the evidence submitted by Commodities showed overheads of approximately ½ cent per year per pound (R. 92), but in the letter of Mr. Bowles, dated March 11, 1944, Defendant's Exhibit 3, he allows $.006232 per pound for about 1 and ¾ years, making the cost of carrying almost negligible (R. 36 and 37).

ELEVENTH POINT.

Commodities could have disposed of its pepper in May 1944 for more than 20¢ per pound and therefore its value and just compensation for the taking thereof exceeded 20¢ per pound.

The Court of Claims found:

"18. During the years 1943 and 1944 which was during the period of shortage of pepper and de-

mands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.

"This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound."

The situation here is the converse of that which existed in the *Felin* case. There the Felin Company had no outlet for its pork chops in excess of the ceiling price and some of the Justices considered that this practical situation should be controlling as to value and just compensation.

Here Commodities could have ground its pepper, mixed it with three portions of parched wheat or cotten seed hulls and could then have sold the concoction for 16¢ per pound. As there would be only ¼ pound of pepper in the 16¢ concoction, the pepper itself would sell for 4¢ an ounce. The Court can take judicial notice of the cheapness of wheat or cotton seed hulls.

The cost of grinding black pepper is only a fraction of a cent per pound (R. 106).

TWELFTH POINT.

Commodities' cost justifies and requires an allowance in excess of 20¢ per pound.

The Court of Claims found the cost of plaintiff's pepper to be 12.7¢ (Spec. Fdg. 24, R. 21-22). But in making said finding the Court stated therein as follows:

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing ex-

penses to Commodities during the period that pepper was purchased and held. No interest is computed upon costs of any of the carrying charges, but only upon Commodities' original cost."

Moreover, the Court of Claims in said finding allowed for "bank interest, commissions, cables, exchange, etc.," only 2.75% per annum.

The interest allowed was not normal of which this Court can take judicial notice.* The interest found by the Court was based on the interest actually paid by Commodities which at one time was only ⅛ of 1% per month (R. 180). But this was explained by a vice-president of the lending bank who showed that the bank had as collateral for its loans to Commodities, the guarantees of several persons of great wealth, stocks and bonds dealt in on the New York Stock Exchange for many hundreds of thousands of dollars and the pepper itself (R. 115). It was the safest possible kind of loan.

Moreover, the directors of Commodities kept balances with the bank of over $500,000 (R. 115). The bank was in effect loaning them their own money. And without risk. No wonder it was willing to do so at ⅛ of 1% at one time.

The Court of Claims in the *Cors* case considered favorably the inclusion in cost of the value of services rendered gratuitously by an owner and this Court apparently approved.

Commodities' cost with some important overheads omitted came to 14.59¢ per pound (R. 93).

The addition of the value of gratuitous services and proper overhead should bring this figure up to approximately 20 cents. Then if an allowance for holding and managing the pepper for 9 years is added, the total should not be less than 21¢ or 22¢. So also if the 12.7¢ figure found by the Court of Claims is built up by including in-

*United States v. Cors, 337 U. S. 325.

terest at a reasonable rate and applying it to *all* of plaintiffs' expenditures in connection with storing and holding its pepper, the cost found by the Court of Claims would be brought up to 16½ to 17 cents per pound even without important overheads. And if overheads and an allowance for carrying the pepper for nine years is added, the total exceeds 20¢.

THIRTEENTH POINT.

Plaintiff lost through the taking of its Pepper, Upwards of $190,000, and suffered Damage through Delay in Payment.

In the prevailing opinion in the *Felin* case, *supra*, this Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction." (p. 641)

and further

> "In enforcing this Constitutional requirement, (the just compensation required by the Fifth Amendment, the question is 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *McGovern* v. *New York*, 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken" (p. 630).

The above is precisely what these plaintiffs claim. Commodities lost 759,750 pounds of its inventory of Whole Black Pepper (Finding 3, R. 13). What must plaintiffs be paid to put them in as good a position pecuniarily as they would have been in if the property had not been taken?

There was a world-wide shortage of pepper. The Japanese had taken possession of Sumatra, and India was

the only pepper producing country which was not cut off from the allies. Destruction by the Japanese had permanently reduced Sumatra's ability to produce (R. 46), and Commodities could have sold in Latin America and other countries for as much as $2.00 a pound if it had not been restricted in exporting and in the price it could charge the foreigner (R. 79).

The pepper trade and the technical advisers of the O. P. A. had urged it for months previous to May 26, 1944 to increase the ceiling price of pepper to from 20¢-30¢ per pound and thereby permit the purchase of Indian pepper and the sale of it in the United States at reasonable profit and had warned the O. P. A. that if it refused to follow this advice, decontrol of the price of pepper would see abnormally high prices and the country and the industry would be injured (Fdgs. 16 and 17, R. 18).

At the end of price control the price of pepper immediately shot up to 60¢ per pound and soon to 80¢ (Fdg. 18, R. 18-19). In May, 1944 it was recognized that such prices would follow decontrol.

Plaintiffs' property was non-perishable, as above shown, and would last indefinitely (Fdg. 25, R. 22).

They could have held their pepper until decontrol or until offered a fair price.

From the above, it is plain that plaintiffs suffered a very real loss—a matter of fact and not of fiction. To show the extent of that loss and to measure their just compensation therefore, plaintiffs proved all of the following bases which had been used by the Courts to determine just compensation: retention value, based on amounts which could actually have been obtained as soon as price control was terminated; retention value, based upon what could reasonably have been anticipated in May 1944; market price (Indian); estimated market price in May 1944, if there had been no War; replacement value; net amount obtainable for its pepper through use as basis of imitation pepper; and cost. Each of the said bases required an allowance of more than 20¢ per pound.

However, in the face of this the Court of Claims allowed only 15¢ per pound. This is explained by the quotation from the opinion of the Court appearing at pages 22 and 23, *supra*, but as shown in the succeeding point the sales at 10¢, 14.19¢ and 16¢ respectively were irrelevant and should not have been considered by the Court of Claims. Moreover, its statement that the 15¢ figure allowed a 2¢ per pound profit over costs is clearly erroneous, as shown in the Twelfth Point, *supra*.

FOURTEENTH POINT.

No one of the Matters which the Court of Claims took into account to reduce the price of pepper below 20¢ as stated in its opinion (R. 27) was relevant and no one of said factors should properly have been given any weight.

The sale in Porto Rico was a trifling matter. It did not take place until June, 1945, more than a year after the requisition here in question (Spec. Fdg. 20, R. 19). The circumstances of the sale are not shown anywhere. The fact of the sale was proven by Petitioners in order to show that there was an outlet for their black Pepper at a price more than twice the ceiling price of 6½¢ and they showed that the provisions of Regulation #52, so far as sales to Puerto Rico, Hawaii and Alaska were concerned, were the same in May, 1944 as they were in 1945, and that therefore Petitioners had had an opportunity to make such sales in May, 1944 (Compare Reg. #52 in effect May, 1944 with amendment of October, 1944 in effect June, 1945).

It does not appear what pressure was put upon Petitioners to make this sale, nor any of the circumstances thereof. On the other hand, the President of Commodities testified that no sales had been made willingly (Tr. 101).

Neither should the sales at 10¢ have been given effect by the Court of Claims. In addition to the statement of

the President above referred to, we have with respect to these sales the fact that the Government was exercising great, and we submit, improper pressure upon Commodities to force it to sell. That it should have sold a portion of its holdings and lightened its load, under these circumstances, is no proof of the price at which a willing seller would have sold to a willing buyer nor of *just* compensation. Instances of the pressure referred to are as follows:

(1) Seizing Commodities' pepper without *any* payment, in violation of Public Law 274, 77th Cong. approved October 16th, 1941, Chap. 445, as amended (see Petition for Certiorari, p. 30; Complaint, R. 1-4; Spec. Fdgs. 4 and 7, R. 13, 14).

(2) The attempt by the Government to requisition practically all of Petitioner's pepper for civilian use (R. 135).

It is true that Plaintiffs had obtained a temporary injunction against this procedure and had defeated in the United States District Court for the District of Columbia, a motion for summary judgment by the Attorney General (R. 135) upon the ground that the statute did not authorize the requisition in question. But that action was still pending. It was War-time and a defeat anywhere along the line would have meant the loss of the pepper.

(3) The O.P.A. had broadcast a distorted and misleading statement of the cost of Petitioner's pepper and had thereby made it appear that Petitioners were grasping, war-profiteers, who were trying to collect two or three times the cost of their pepper (Respondent's Ex. 3, R. 36, 37).

(4) Pressure was put upon Commodities and OPA and the Department of Agriculture acting together exacted agreements or promises from Commodities that it would sell a number of million pounds of pepper at 10¢ (R. 104).

Moreover these sales took place more than five months after the requisition.

The sale at 16¢ was a compromise entered into with OPA and did not in any way measure a transaction between a willing seller and a willing buyer. The circumstances were much the same as the sales at 10¢ (R. 108).

The ceiling price at that time was 10¢. Commodities was demanding 22¢. It made a compromise and sold for 16¢. Moreover, this was more than two years after the seizure.

FIFTEENTH POINT.

The Government's refusal to return the excess pepper requisitioned and its selling of same for 75¢ per pound at the close of the War is relevant on the subject of the value of the Commodities pepper and is also a strong argument that some liberality should be exercised in estimating what Commodities lost through the taking of its pepper.

The Army requisitioned far more Lampong Black Pepper than it needed and had on hand large quantities at the end of the War (Tr. 201).

Efforts were made by dealers and representatives of the pepper trade to induce the Army to return this surplus pepper to the persons from whom it had requisitioned pepper, but the Army refused so to do (Tr. 200-202).

On or about the 16th day of November, 1946 plaintiff, Commodities, or its individual stockholders, said plaintiff being in the process of dissolution, were offered by the Government the privilege of purchasing a proportion of the pepper requisitioned from plaintiff, Commodities, at 75¢ per pound (Tr. 452-7, Pl.'s Exh. 5 for ident.).

This offer was accepted by some of said Stockholders (Pl.'s Exhs. 6-A, 6-B, 6-C, for Id., R. 132, Tr. 184-6).

Plaintiff's exhibits above referred to were excluded, although the testimony was admitted. Plaintiffs duly excepted upon the trial and have assigned error (Assignments 55, 56, 57, 58).

Conclusion.

This Court should overrule the errors claimed by the United States and should hold that the OPA ceiling price was not a relevant factor in determining just compensation in this case. This Court should further hold that the factors of cost; retention value; market price if there had been no war; Indian market price; and the market price of imitation pepper, each was a proper measure of the value of the requisitioned pepper and of just compensation therefor and the judgment of the Court of Claims should be set aside and it should be directed to find just compensation in accordance with the above mentioned factors and at the amount demanded in the complaint.

New York, New York, December 23, 1949.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1949.

No. 163. **163**

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156. **156**

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION, *et al.*,
Defendants in Error.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Reply Brief for Commodities Trading Corporation, et al., Plaintiffs Below, and Plaintiffs in Error in No. 163 and Defendants in Error in No. 156.

EDWARD L. BLACKMAN,
Counsel for Commodities Trading Corporation, et al.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156.

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION, *et al.*,
Defendants in Error.

Reply Brief for Commodities Trading Corporation, et al., Plaintiffs Below, and Plaintiffs in Error in No. 163 and Defendants in Error in No. 156.

Opinion Below.

The opinion of the Court of Cairns is reported at 113 C. Cls. 244.

Jurisdiction.

The judgment of the Court of Claims was entered on April 4, 1949. The petition for a writ of certiorari in No. 156 was filed on July 1, 1949, and the cross-petition for

writ of certiorari in No. 163 was filed on July 5, 1949. Certiorari was granted in both cases on October 24, 1949 (R. 138-139). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

Questions Presented.

The Solicitor-General's statement of the questions presented differs radically from Commodities' view thereof.

The lawful ceiling price referred to was the ceiling price which was fixed more than two years prior to the taking here in question and the substantial trading which took place at that ceiling price was not ordinary mercantile trading but was the selling out of importers, who had a 6½ cent ceiling, to packers and grinders, who had a 12½ cent ceiling, because said importers were not strong financially and were scared out by the ceiling price and governmental action hostile to the holders of pepper (O.P.A. Price Reg. 52, Spec. Fdg. 15, R. 18, 89-90, 108-109).

This selling quickly dried up, and for many months prior to May 26th, 1944, the date of requisition, there had been no sales whatever (Spec. Fdgs. 14, 19, R. 18, 19). Between the time of said so-called substantial trading and the date of requisition, conditions had changed completely. At the date of fixation of the ceiling price there was a three-year supply of pepper in the United States and more pepper was coming in freely, in fact, was being dumped on the New York market (Spec. Fdg. 8, R. 15, 108). But shortly thereafter, the pepper supplies from Sumatra, which usually supplied the United States, were cut off by the Japanese military successes and supplies from India, where there were large quantities exportable to the United States, were cut off by the action of O.P.A. (R. 46, 102, Spec. Fdg. 23, R. 21) and by May 1944, there was a dearth of pepper throughout the whole world, including the United States, despite the fact that sales of pepper had been rationed and had finally been brought

down to 40% of normal prewar business (R. 41, 44, Spec. Fdg. 13, R. 17-18).

All of the above facts must be included in any fair statement of the question presented. Moreover, the retention value referred to by the Solicitor-General did not include scarcity value caused by wartime shortages, nor a speculative value, but was the value after the elimination of wartime shortages, and was based on factors that were definite and known and had taken place before the beginning of the War (Spec. Fdgs. 25, 26, R. 22-23, 45, 98-99, 100-102, 107).

The fundamental questions presented as Commodities sees them are as follows:

1. Do sales at ceiling prices many months before the date of a requisition furnish any basis for market value in cases where conditions had changed completely between the time of sales and the time of requisition?

2. Should any weight be accorded to a ceiling price for a commodity not produced in the United States in determining just compensation for property requisitioned when the evidence all showed that the said ceiling price was completely out of line with prices everywhere in the world outside of the United States and where the entire trade objected to said prices and importuned O.P.A. to increase them, and where O.P.A., itself, found that a 60% increase could be made without increasing the cost of the commodity to the consuming public as such increase in the basic price could well be, and should be, absorbed by the middleman.

3. In the case of the requisitioning of a Commodity, for which a general ceiling price has been fixed, is not the force or effect which might otherwise result from such ceiling price completely destroyed by the fact that the

holders of said commodity could lawfully sell currently at much higher prices than said ceiling prices, by changing the form of their property or by adopting a slightly different method of disposing thereof.

4. Where a commodity is not perishable and is easily and cheaply stored, is not the right of the owner to hold his property until the end of price control and obtain a price therefore which was inevitably several times the ceiling price, a substantial and valuable right which gave a value to the property at the time of taking far in excess of the ceiling price?

5. Does not the cost of property which is requisitioned constitute a measure of value where there is no market and where other measures of value are lacking or difficult of application and may there not be included in said cost, the value of the services of the owners gatuitously furnished?

6. Can just compensation of property requisitioned which has a high value throughout all the world, partly due to the destruction of War, be less than the fair market price that said property would have commanded at the time of requisition, had there been no War?

7. In a case of a requisition of black pepper, does not the current market price in British India of 21¢ per pound furnish the best measure of value where the Department of Agriculture had arranged with the Allied Food Board to allocate 20,000,000 pounds of whole black pepper to the United States, and where such importation was prevented only by the refusal of O.P. A. to permit the same, and where there was an urgent demand in the United States and the increased cost to the users over the ceiling price would be negligible, and where such Indian price was

moderate and even low in comparison with the ceiling prices which had been fixed by O.P.A. for other spices?

8. Can increase in value due to War, but not to Government demand be lawfully excluded in determining just compensation?

9. Do not the Emergency Control Act and the Act of October 16, 1941, both separately and taken together, clearly indicate that it was the Congressional intent that ceiling prices fixed by the O.P.A. should not be taken as the measure of just compensation?

Facts.

The brief of the Government is generally unfair in its Statement of Facts and is in direct conflict with the undisputed evidence at many points, including the following:

The statement of the counsel for the Government that the pepper which was taken by the Army under the requisition here in question was high priced pepper which had been deliberately selected for it by Commodities to make the cost of the requisitioned property high (Br. 21-22) is not only without one word of support in the record, but is in flat contradiction of the plain and direct testimony.

The Witness, Corbitt, an accountant employed by a firm of Certified Public Accountants, who supervised the accounts of Commodities, testified that the 14.59¢ average cost to the company of the pepper seized was also the average cost of all of the pepper owned by Commodities at that time (R. 93).

The agreement between the average price of all the pepper owned by Commodities and that taken by the Army was due to the fact that Commodities selected bags for the Army to take "so that we would get an average cost, or as near an average cost as we could, so that

there would be no question as to whether this was high-priced or low-priced pepper" (R. 94, 95).

The Attorney-General further accuses Commodities of having selected pepper which had been longest on storage in order to inflate further the cost of the requisitioned pepper (Br. 100). This also is wholly unfounded and impossible in view of the above testimony. The 14.59 cent cost figure included storage, interest and other overheads, so that the cost of the requisitioned pepper and the cost of the pepper retained by Commodities were on the same basis, and the average total cost of each was the same including storage and other overheads (R. 92, 93).

The development of the Government's argument on the above points is interesting. It has been careful throughout its brief to give references with regard to practically every statement which it has made, but pages 21 and 22, where the above charges were first made, contains no reference to the evidence whatever. At page 100, its charge that Commodities itself selected the high price pepper for the Government to take, contains a reference: "*supra*, pp. 58, 61-63", but looking back at those pages, it will be found that there is no reference whatever in the record in support of any such alleged manipulation. The only reference to this general subject is the letter of the Price Administrator finding an average price for Commodities' pepper, including storage, interest, insurance and many other overheads of 5½¢ on an alleged first in—first out basis.* As shown in Commodities' Main Brief, pages 58 and 59, the actual cost, without numerous overheads, was 14.59 cents, and the cost found by the Court of Claims was 12.7 cents, but stating the omission of many important overheads.

The Government's Brief (p. 57), states as follows:

> "3. *The administrative determination of the fairness of the ceiling price as applied to Commodi-*

*This statement of method used was not in accord with the facts.

ties.—In addition to the proof afforded by the large-scale trading in pepper at the ceiling price, there was, in March 1944, an express administrative determination that the established maximum was not only fair and equitable in general, but also fair and equitable to Commodities. On October 4, 1943, the first formal challenge against the pepper price ceilings was filed, and it was by Commodities" (R. 35-37).

* * * * * *

"(a) The Price Administrator denied Commodities' request because he found that, even without that additional provision, the ceiling price allowed Commodities a profit substantially in excess of the normal profit in the trade (R. 36-37). He also specifically determined that the general price ceiling should in all fairness be applied to Commodities" (R. 37).

This denial was in the form of a letter.

In the letter O.P.A. found a cost price to Commodities of 5½ cents per pound. The Accountants of Commodities found a cost of 14.59 cents, omitting some overheads (R. 92, 93), and the Court of Claims found a cost of 12.7 cents per pound, omitting many overheads (Spec. Fdg. 24, R. 21-22).

Following the above statement the Solicitor-General has throughout his brief referred to the administrative determination of the fairness of the ciling price.

There is no support whatever for these statements. Commodities never attacked the ceiling price. It knew better. With all of the obstacles to a fair trial pointed out in the opinion of Mr. Justice Roberts in the *Yakus* case, 321 U. S. 411 at pp. 454-459 and with the burden upon it of proving not only that the ceiling was too low but also that the action of the Administrator had been capricious or

arbitrary and having such burden in time of War it knew it had little chance of knocking out the ceiling price. Besides it did not wish to. What it did was to address a petition to O.P.A. asking a modification making an allowance for storage. O.P.A. denied the petition by a letter dated March 11th, 1944 (Def.'s Ex. 3, R. 36). There had been no trial or hearing. No foundation for the letter whatsoever was proven, and it was a deliberate distortion of the facts.

When the paper was offered in evidence (R. 121), Commodities objected (R. 121-122). It was received over Commodities' objection and exception (R. 122).

The fact that Commodities' application to O.P.A. was denied was found by the Court of Claims, but it refused to find the facts stated in the letter (Spec. Fdg. 21, R. 19-20).

There was no support whatever for any of the facts stated in the letter and it has no proper place in the discussion of the evidence. It was presented by the only witness called by the government, Mr. Squires, the former Chief of the Spice Section of O.P.A. (R. 35). This gentleman had been a coffee merchant in New Orleans up to the time of his appointment to O.P.A. (R. 34). There is no testimony to show who produced the figures or that any competent accountant advocated the so-called "first in—first out" method, which was stated in the letter to have been used by O.P.A. However, the statement that the accounting was taken on that basis was false and was shown so to be by the cross-examination of Squires (R. 110-111).

The "first in—first out" theory, as this Court doubtless knows, is sometimes employed in Income Tax accounting, where there are masses of merchandise of a homogeneous kind, from which sales have been made from time to time at different price levels, and where the merchandise itself was acquired at different price levels. In

such case, the first sales are considered as having been made with respect to the first quantities purchased because of the difficulty of proceeding on any exact basis. This procedure had no proper application to the determination of Commodities' costs as it had a complete record of every separate lot which it had purchased, with the cost, and date of purchase, together with a record of the quantity and selling price of each parcel sold and the particular lot from which it had been withdrawn (R. 93).

Moreover the said Government witness, Squires, admitted the accuracy of Commodities' accounts, kept under the direction of a firm of C.P.A.'s which showed a cost of 14.59 cents per pound, without the inclusion of some important overheads, and explained that his result of approximately 5½ cents a pound was because of a different method of accounting (R. 110, 92, 93, Deft.'s Ex. 3, R. 36).

On cross-examination, Squires testified that what O.P.A. actually did was not to consider sales at all, but to start with the last purchase which had been made by Commodities, and keep on including and adding purchases until they obtained the amount of 19 million 545 thousand pounds, which was the amount of pepper that Commodities had at the outbreak of the War (R. 110-111). He divided the total payments therefor by those pounds and got 5½¢. He admitted that by this method he included only the purchases which had taken place after September 1936 (R. 111) and excluded all carrying charges back of that date (R. 111). His method was not sustained by any testimony and is clearly improper. Its use was obviously an intentional distortion to get a low price for Commodities' pepper.

The proof is that for the four-year period preceding the outbreak of the war, Commodities was not accumulating pepper, but was a heavy seller, having sold 8 million pounds on balance during this period (Spec. Fdg. 5, R. 13-14). Everyone of normal intelligence knows, and a

coffee merchant should have known, that one does not dispose of 8 million pounds of a small commodity like pepper by selling consistently and never buying. This would inform the entire trade of what he was doing, and would lead to low prices paid by purchasers, based on that knowledge.

Any intelligent trader, who wishes to dispose of a large quantity of anything—stocks or bonds or commodities—buys as well as sells, but sells on balance. Consequently, the purchases which Mr. Squires took were obviously, for the most part, only purchases made to screen the sales. But the admitted fact is that by the method used, Squires found that all of Commodities' purchases were made between Pearl Harbor Day and the middle of 1936, working back, although Commodities had actually reduced its inventory by about 8 million pounds during that period (Spec. Fdg. 5, R. 13-14).

The reason why a distorted method of this kind was used was that it contained only low cost pepper purchased subsequent to 1936 and excluded all of the much higher cost pepper purchased prior to 1936 (see graph R. 16 and R. 111). Moreover, as above stated, said price included only the storage charges that would have been applicable to recent purchases held for short periods, and omitted entirely the storage and other carrying charges on pepper which had been bought in 1933 and 1934, and was still on hand, upon which storage charges had been paid every month (R. 111, Spec. Fdg. 24, R. 21-22). By this method O.P.A. obtained and published a 5½¢ price including interest, storage and other overheads in the face of the admittedly correct figure of 14.59¢ testified to by Commodities' accountants and a 12.56¢ price found by the Court of Claims omitting important overheads (Deft.'s Ex. 3, R. 36, R. 92, 93, 110, 111, Spec. Fdg. 24, R. 21).

It was more than a coincidence that this letter (Deft.'s Ex. 3, R. 36-37) denying Commodities' application for an

increase in the ceiling price, was not made until nearly five months after the application had been filed, and was then issued practically simultaneously with the attempt to requisition practically all of the pepper in the country which attempt Commodities defeated *in toto*.*

It is characteristic of the fairness of the Government's brief that this letter is referred to repeatedly as an "Administrative Determination" of the fairness of the O.P.A. ceiling price and of the fairness of that price to Commodities.

Again, at page 100, the Government states that Commodities "adopted the policy of retaining its high-cost pepper as long as possible, disposing first of the lower-cost stocks".

The statement of counsel continues that this practice was indulged in to inflate the cost of the pepper seized by the Government.

The above statement is wholly unsupported and is ridiculous, in view of the undisputed facts found by the Court of Claims. Commodities sold no pepper willingly, and practically no pepper at all subsequent to Pearl Harbor Day and prior to the requisition here in question (Spec. Fdgs. 5, 8 and 14, R. 13-14, 15, 18).

The only time, therefore, that Commodities could have indulged in the practice charged by the Government, would have been prior to December 11, 1941.

The Government's charge therefore reduces itself to this,—that Commodities, before the War, and before there was a ceiling price, deliberately kept its high-price pepper and sold its low-price pepper so that if a War should happen, and if its pepper should be requisitioned by the Government, the requisitioned pepper would have a high cost.

In addition to this the Government's statement is a charge that Commodities deliberately made apparent and

*NOTE: *Commodities Trading Corp.* v. *Federal Surplus Com. Corp., et al.*, Civil Action No. 23573, U. S. D. C. for Dist. of Col. referred to in Brief of U. S. page 50, note.

taxable but unreal profits prior to the War by selling its low-price pepper and keeping its high presumably so that it could pay income and excess profit taxes thereon to the Government.

On this same page 100, after stating how Commodities had "*inflated*" its costs, the Government continued:

> "If more realistic and fairer methods of determining costs are adopted, there is no basis for the claim that the Price Administration under-estimated the cost of Commodities' pepper."

The Price Administrator's cost, above referred to, was a total of 5½¢ cents for cost of pepper, storage, insurance, interest, shrinkage and other overheads.

As above stated, the Court of Claims found a price of 12.7 cents, omitting many important overheads (Spec. Fdg. 24, R. 21-22).

This was not a new matter, but was thrashed out before the Commissioner of the Court of Claims and before the Court of Claims itself and in the applications for certiorari to this Court, but the Government persists in making these wholly unfounded charges.

A further example of statements in the Government's Brief, which are contrary to the facts, is as follows:

The Government asserts (Br. 31) that two of Commodities' expert witnesses agreed that 6.75¢ a pound for pepper was approximately the *fair* market price as of December, 1941, and cites R. 59 and 88. This statement is contrary to the evidence. The testimony referred to begins at the bottom of R. 58, where the witness was cross-examined by the Government's attorney, and is as follows:

> "Q. O.P.A. prevented a seller to be a willing seller, how? A. Because O.P.A. put out an unfair price

> to the holders of pepper which the holders of pepper did not want to sell at, and the trade has been trying all that time to change the mind of O.P.A. and bring about a market but the O.P.A. would not listen to the advice of the trade * * * " (R. 59).
> "A. The ceiling price which was established on December 7th was low. It was according to the market of that month" (R. 59).

The witness continued (R. 60) and said that every member of the Advisory Committee on Spices had repeatedly advised the O.P.A. that by holding down the price of pepper to what was an unfair and impossible level it was creating a scarcity which would bring about a tremendous reaction later on (R. 60).

The testimony of the other witness referred to showed that the spice trade considered that the O.P.A. ceiling price was too low except as a temporary expedient. He stated that when the price was fixed O.P.A. had agreed with the Committee of the Spice Trade that as conditions changed the price would be adjusted, and stated further "That was what we were hollering about all through the later years of the War. It got scarce, World prices kept getting higher up and we kept making repeated representations to the O.P.A. to increase the price so that we could do business" (R. 88).

Throughout his brief, the Solicitor-General refers to Commodities as having a near monopoly of all the pepper in the country, and as being responsible for the fact that there had been no market for nearly a year prior to the requisition (Br. 17, 22, 63-66). These statements are most unfair.

It is true that Commodities had 16 million pounds of Whole Black Pepper in May 1944, out of a total of about 30 million pounds in the hands of importers, but there was 13,698,000 pounds in the hands of grinders (R. 128) and

the record does not show what stocks were in the hands of wholesale grocers, in the hands of the tens of thousands of retail grocers, or in the hands of the millions of housewives, who stocked up on pepper and other non-perishable commodities as soon as a scarcity threatened. Besides this, there was, of course, the stock of 20 million pounds in India earmarked for the United States, which the Indian dealers could not dispose of to any one else. This pepper O.P.A. was keeping out of the country and preventing a market by refusing to cooperate with the Department of Agriculture and the Allied Food Control Board (Spec. Fdg. 23, R. 21, Tr. 77-78) and ignoring the wishes of the entire pepper trade (R. 63-64, Tr. 77-78).

It is true that Commodities refused to sell at the 6½ cent price, but so did all the other holders (Spec. Fdg. 19, R. 19) and with respect to this matter, the Court of Claims found that the leading men in the industry, importers, brokers and dealers, all recommended that the price be increased, and that it was much too low (Spec. Fdg. 16, R. 18).

Moreover, at this time O.P.A. was permitting the sale of imitation pepper, consisting of one-fourth or less real ground pepper, at a price to yield the seller a return of about 30 cents net on the pepper contained (Spec. Fdg. 18, R. 18-19). (See Commodities' Main Brief, p. 57.)

Furthermore, this refusal to sell was with respect to pepper which had an average cost to Commodities of more than 14.59 cents per pound, which O.P.A. was demanding that it sell at 6½ cents (R. 93). At the same time, O.P.A. was allowing, according to its own admission, an unconscionable profit to packers and grinders who would use Commodities' pepper if it sold. Thus, when O.P.A. increased the ceiling price from 6½ cents to 10 cents in October 1944, it stated:

> "* * * The increase granted will not affect the cost of living since the increased cost to the indus-

trial users is only a very small element in the cost of their finished products and can be absorbed; nor is any change made in the price of consumer-size packages. *The present margin of profit of packers of consumer-size packages is believed to be sufficiently adequate to permit them to absorb this increase in the maximum price of the whole pepper.*" (Italics ours.) (O.P.A. Reg. 52, as Amended Oct. 9th, 1944.)

Thus, the pepper packers were making so large a profit that a 60 per cent. increase in the cost of the pepper to them was held not to justify any increase in their ceiling prices, but Commodities was expected to sell for less than half of cost.

Summary of Argument.

The Solicitor General has cited 83 cases, numerous references to foreign laws, treatises, law reviews, etc.

These citations cover an expanse from Blackstone and Grotius to the case of *United States* v. *Toronto, Hamilton & Buffalo Navigation Company*, decided December 12th, by this Court.

(His brief was served upon Commodities on January 5th, but a typewritten copy was served about a week previously.)

It has, of course, been impossible for Commodities to prepare a criticism distinguishing the cases cited, but it does not consider this necessary as there have been several recent decisions of this Court which all seem to sustain Commodities' views.

Moreover, the Government's position must be a weak one when it is considered necessary to pile up authorities or references to such an extent.

The latest three decisions by this Court on the subject of just compensation that Commodities has found are

United States v. *Felin & Co.*, 334 U. S. 624;
United States v. *Cors*, 337 U. S. 325.
United States v. *Toronto, Hamilton & Buffalo Navigation Co.*, this term, No. 39, decided December 12, 1949.

While the allowance for just compensation made by the Court of Claims in each of these cases was held not to have been properly supported, in each instance the Court has apparently reiterated the rules contended for by Commodities, which are those so clearly set forth in *United States* v. *New River Collieries Co.*; namely, that one whose property is taken is entitled to be reimbursed for the loss which he has sustained, and that just compensation is a matter of judicial determination.

In the *Felin* case, above referred to, the Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction" (334 U. S. 624, 641).

and further:

> "In enforcing this Constitutional requirement (the just compensation required by the Fifth Amendment), the question is: 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *McGovern* v. *New York*, 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken."

In the *Cors* case, while there was disagreement among the members of this Court as to the justment to be rendered, the Justices were all agreed that just compensation was a matter for judicial determination.

The Government's counsel apparently admits this last point, but in a statement of the greatest sophistry that has come to the attention of Commodities' counsel in a long practice, says:

> "E. Acceptance of the price ceiling as the proper measure of just compensation would not invade the judicial function in requisition proceedings. Even if one accepts the principle that the courts alone have the power to develop and establish the rules and measures governing eminent domain awards, there is nothing to prevent the courts from independently accepting and using valid price ceilings" (Br. 20, 21).

Of course this Court could accept any price that it found just and reasonable, but the Government's argument is that the Court *must* find the ceiling price to be just compensation—*as an independent determination!*

There is no support for the Government's contention that there was any Administrative adjudication in this case. This is discussed in the "Facts" *supra.*

Moreover the ceiling price, so far from being recognized as fair and reasonable, had the condemnation of the entire pepper trade and was maintained in violation of O.P.A.'s representations to the trade when it was first fixed (Spec. Fdg. 16, R. 18). Nor was this ceiling price one which the Government as a whole approved. The Department of Agriculture induced the Allied Control Board to set aside many million pounds of Indian pepper for importation by the United States. This pepper was earmarked for the United States and the Indian holders were prohibited from selling elsewhere. The plan was to provide for the importation of the pepper in manner similar to the plan which had been put into effect with respect to Indian cinnamon, but O.P.A. upset the arrangement by refusing to increase the ceiling price to a

point where this Indian pepper could be imported (Tr. 76-78, Spec. Fdg. 23, R. 21).

However, after Commodities had parted with the greater part of its pepper under pressure and after the Government had ceased to requisition, O.P.A. did permit the importation of much of this Indian pepper at prices as high as 23¢ per pound (R. 46-48).

At the time of requisition Commodities had many opportunities to dispose of its pepper through perfectly legal channels and obtain therefor compensation two or three times or more than the ceiling price (see Main Brief, Point VII). At the time of the seizure pepper was selling in countries where there was no price control for as much as $2.00 per pound (R. 72). The world had been swept practically bare of pepper except in India, which consumed most of its pepper, itself (R. 44-45, Spec. Fdg. 23, R. 21). It was obvious at that time May, 1944 that the end of the War would see very high prices for pepper. This was predicted by the entire Spice Trade and represented to O.P.A. (Spec. Fdg. 16, R. 18). Pepper is not perishable and lasts unimpaired in value for many decades (Spec. Fdg. 25, R. 22). Commodities could have kept its pepper and sold at high prices at the end of control. This was clearly apparent in May 1944.

Commodities contends that both by reason of its ability to sell currently in May, 1944 far in excess of the ceiling price, and its ability to hold its pepper and sell for as much as ten times the ceiling price at the end of price control, the ceiling price was in no way the measure of the value of its pepper and that said pepper had a value equal to the 22 cents demanded in the complaint as a minimum, particularly as its pepper would have had a market value of at least that amount in the United States in May, 1944, if there had been no War (see Main Brief, Point IX, pp. 48-53).

Moreover, O.P.A. thwarted the plans of the Department of Agriculture and the Allied Food Board to bring

Indian pepper into the United States and make a market for it there similar to what had been done in the case of Indian cinnamon (Tr. 76-78).

In view of all of the foregoing, who was responsible for preventing sales of pepper in the United States in 1944?*

FIRST POINT.

While Commodities believes that general well-established rules for determining "just compensation" entitle it to all that it asked in its complaint, it considers that the general equities are nevertheless the strongest basis upon which to present its case, and accepts the challenge made in the Government's Point I.

The Government, in its Point I, says that in determining "just compensation" a balance is struck between the public's need and the claimant's loss, cites many cases (Br. 25), and states that:

> "The Constitution does not incorporate any particular standard or measure of payment—be it 'market value' or 'value' of any type—and, as recent opinions emphasize, mechanical, mathematical, or routine standards often have been rejected because of the demands of equity" (Br. 26).

and then epitomizes its contention as follows:

> "Thus, the only fundamental measuring rod laid down by the Fifth Amendment—and, consequently, the only basic standard to be applied in this case—

*Note: In 1945, after Commodities had been coerced into selling a large portion of its pepper at 10 cents a pound, O.P.A. did permit the importation of Indian pepper and payment of 23½ cents per pound therefor (R. 47). Furthermore, O.P.A. permitted importers, a classification in which Commodities Trading Corporation was placed, to sell for $1.00 a pound in South America, Indian pepper, which they had been permitted to purchase for 23 cents per pound. This right was denied to Commodities (R. 46-49).

> is that the compensation to be paid to the owner be fair and just both to him and to the public. And to the extent that the subsidiary standard of 'market value' is to be used, it must be a '*fair* market value,' from which all elements tending toward an inequitable result have been abstracted" (Br. 28-29).

In developing this Point, the Government seems to have discarded all rules for determining just compensation which this Court has laid down over one hundred years and has advanced a theory that just compensation is purely an equitable matter and is to be determined in each case solely upon equitable principles, without any established guides, and may vary with the ideas of the particular Court which makes the determination, somewhat like the old equity rules in England, which were said to vary with the size of the Chancellor's foot.

While Commodities cannot subscribe to the above, it considers that its strongest claim to compensation consists of the general equities in the case as follows:

(a) Commodities built up laboriously over six years an inventory in the United States of over 25 million pounds of pepper, which total was reached in 1939 (R. 14). When the war clouds appeared in the East, Commodities did not buy more, or try to run up the price of a commodity from the supply of which we might be cut off, but reduced its holdings by 8 million pounds between 1939 and December 7th, 1941 (Spec. Fdg. 5, R. 13-14).

It held 21,000,000 pounds at the time War broke out, approximately 4,000,000 pounds of which had been sold for future delivery, and were delivered during the first months of 1942 (Spec. Fdg. 5, R. 13-14).

Its dealings were largely responsible for the fact that the beginning of the War found this country in the fortu-

nate position of having more than ten times as much pepper in storage than was usual during the years prior to this Company's operations (R. 134).

(b) Commodities repeatedly offered to let large amounts of its pepper to go at cost or less (Spec. Fdg. 22, R. 20, 123, Def.'s Exh. 5, R. 135, received R. 125).

O.P.A. prevented the acceptance of these offers and insisted that Commodities sell only at the ceiling price of 6½ cents, despite the fact that its costs have been shown *supra* to have been substantially in excess of 12.7 cents per pound.

2½ million pounds of the above unsold 17,000,000 pounds were requisitioned. (See Suits of *Commodities Trading Corp.* v. *U. S.* in Court of Claims No. 47587, 47588. Note on page 8 of Government's Brief.) The remainder was finally sold by Commodities during price control at average prices much below those at which the Government, or anyone else, was able to buy pepper in the latter days of the War, and went far toward relieving the pepper shortage which existed (Spec. Fdg. 19, p. 19).

Commodities does not claim to be a charitable organiization, but it thinks that it is entitled to some consideration for having imported and built up and carried for 11 years a great supply of pepper, something no one else had done. A supply which was availed of by Army, Navy and public to relieve an acute shortage.

(c) Commodities was not a dealer in pepper in the ordinary sense (R. 52-53, Def.'s Ex. 5, R. 133, Received R. 125). It had no customers and was under no obligation to supply anyone. It belonged to no trade organizations, but was an investor, which started out in 1933 to accumulate a large inventory, and hold it for the high prices that were bound to come with the turn of the cycle of prices which had been repeated with considerable regularity for

more than seventy-five years (R. 53, Spec. Fdg. 9, R. 15-16). (See Main Brief, p. 23, *et seq.*).

If it had been allowed to keep its pepper until the end of price control, it could have sold it immediately at from 50 cents to 60 cents per pound and have made a great profit, several million dollars (Spec. Fdg. 17, R. 18). But it was hounded and practically forced to sell the remainder left after the requisitions at prices only one-fourth or one-fifth of what it could have obtained at the end of the War, and at no more than one-twentieth of prices which obtained during the War in countries where there was no price control, said uncontrolled prices being as high as $2.00 per pound (Spec. Fdg. 19, R. 19, 62, 79). The requisition deprived Commodities of a substantial part of a wonderful investment. While it started out to hold its pepper "in anticipation of the rise in price which the history of the industry showed was bound to come" even if there had been no War (Spec. Fdg. 26, R. 22-23, Graph in Spec. Fdg. 9, R. 16, R. 26, 53), the inevitability of high prices at the end of the War was made more certain by the destruction following the Japanese invasion of Indonesia (R. 46, 102).

(d) The Government, in the case of pepper, as in the case of practically every other substance which the Army required, requisitioned quantities far in excess of the Army's actual needs (R. 72-73; Tr. 82-83).

At the end of the War, it was importuned by the persons from whom it had requisitioned pepper to return the surplus *pro rata* to the requisitionees (Tr. 83, R. 73). This it refused to do (Tr. 83, R. 73) but later, the Government, which as a matter of "fairness and equity" is seeking to restrict Commodities to 6½ cents, offered to sell *pro rata* to requisitionees, including Stockholders of Commodities (which had been dissolved meantime), a small percentage of the pepper which had been requisi-

tioned at a price of 75 cents per pound!! (R. 116-117, Pl.'s Exhs. 5, 6A, 6B, 6C for id. offered R. 117-118, 132). This offer was accepted by some of Commodities' Stockholders (R. 117), and it is a matter of public record that large quantities of surplus pepper were sold by the Government at prices approaching said 75 cents.

While it was impossible for Commodities to obtain the detailed facts, this Court, on the basis of general public information, would be warranted in assuming that the Government could pay Commodities, and other requisitioncs, the full price per pound asked in this Complaint, and still get all of the requisitioned pepper which it actually supplied to the Armed Forces, *without cost to itself*, in view of the huge profit on the surplus.

Proof of the 75 cent offer was attempted by Commodities upon the trial before the Court of Claims. The offers to four of the Stockholders of Commodities were marked as Plaintiff's Exhibits 5, 6A, 6B and 6C, for Identification. They were all identical, and a sample appears as Plaintiff's Exhibit 5 for Identification (R. 131-133). The papers were first identified (R. 93) and were offered (R. 116-118).

The papers were not received in evidence and the Court of Claims refused to make finding thereon.

Error was assigned therefore. Nos. 55, 56, 57 and 58. Such a ruling may have been correct if the just compensation for Commodities' pepper were to be determined according to the regular rules which have been commonly applied. However, if the question is one of general equities only, and of what price would be fair to the Government and fair to Commodities, the fact that there was this great increase in the price of pepper, which Commodities lost through Government action and by which the Government gained so greatly, seems to be more relevant and important.

(e) The cost of Commodities' pepper to it in May, 1944, was 14.59 cents, with several important overheads

not included, and with valuable contributions of time and labor without charge by the four Stockholders, according to the testimony of the Company's accountant (R. 93).

The cost of the pepper, according to the Findings of the Court of Claims was $0.127 (Spec. Fdg. 24, R. 21-22), but this Finding, upon its face, states an omission of interest upon cost of storage for eleven years in the case of some of the pepper, and many omissions and obvious understatements, the addition of which would bring cost of the pepper to 20 cents or more (R. 22) (See Point XII of Main Brief). Error was assigned to this finding. See pp. 17-18 of Main Brief.

(f) Plaintiff had the opportunity to sell its pepper currently for far more than the ceiling price, as follows:

(a) By grinding the same and mixing with cheap ingredients and selling the total for 16 cents a pound, to obtain approximately 30 cents per pound on the pepper contained in the concoction (Spec. Fdg. 18, R. 18-19) (Main Brief, pp. 57-58).

(b) By selling to Porto Rico, Hawaii and Alaska at prices more than twice the ceiling price of 6½ cents, no license required (Spec. Fdg. 20, R 19, O. P. A. Price Regulation 52, Tr. 154) (Main Brief, pp. 44-45).

(c) By selling to Central, South America and other sections of the Western Hemisphere for prices far in excess of ceiling prices, but export licenses required (R. 41, 79-7, 98-92) (Main Brief, p. 45).

(d) By selling to steamships, Red Cross and others, in slightly less than full one-bag lots (F. D. O. 19) (Main Brief, pp. 43-44).

(g) Commodities could have retained its pepper and sold it at the end of price control for prices which were

actually six or seven times the ceiling price of 6½ cents, and which it was plain in May 1944 would be approximately that high (Spec. Fdgs. 16, 17, R. 18) (Main Brief, pp. 53-57).

(h) Pepper would have sold in New York, in May 1944, for a price in excess of 22 cents a pound, had there been no War (Main Brief, pp. 48-53).

On a basis of pure equity, this is one of the strongest of all of Commodities' points.

The Army needed pepper. Its only source of supply, except requisitioning pepper in the United States, was to buy Indian pepper at a cost of 21 cents delivered alongside, plus the cost of handling, etc. (Spec. Fdg. 23, R. 21, 44-45, 47-49).

Commodities' pepper would have sold for as much as that, if there had been no War (see Main Brief, Ninth Point, pp. 48-53).

The Government condemns this point as purely hypothetical and says that there was a War (Br. 94-95). However, in the next sentence almost, it declaims against Commodities being allowed War profits. Commodities confidently submits that the point in question is a relevant and important one in any case, but, surely, if the question is one only of general fairness, the Government cannot deprive Commodities of the value that its pepper would have had in May 1944, due to causes which had taken place prior to December 1941, and wholly without regard to War, because the value of the pepper had been further increased by the Japanese invasion of Sumatra and the attendant destruction.

Moreover, the force of the Government's criticism is destroyed by the fact that it cites, in support of its argument that "just compensation" must not include War profits, the British Indemnity Act of 1920, which provided that compensation for the taking of vessels should take account of the profits which the owner would have made

if there had been no War, and not take account of any increase of market values of tonnage or rates of hire due to the War (Government's Brief, p. 86).

(i) Pepper was discriminated against and the O.P.A. refused to keep its agreement with the Spice Trade with respect to pepper and refused to permit the Combined Food Control Board and the Department of Agriculture to carry out their plans for the importation of Indian Pepper (R. 88, Tr. 77-78, Spec. Fdg. 23, R. 21).

As this Court doubtless knows, there is a great variety of spices. Black Pepper is the most important, with cinnamon next (Tr. 76). These spices are all, or practically all, grown in foreign tropical countries. The War cut off much of the supply, but there was a world production and a world market. With respect to all of these spices, except pepper, the O.P.A. fixed no ceiling price at the beginning of the War and allowed the price to rise during January, February, March and April and prices therefor were finally frozen by ceiling prices based on the March 1942 prices (R. 54). The ceiling price fixed for Black Pepper was less than one-half of the average price therefor for fifty years preceding the War (R. 44), whereas the ceiling prices for all other spices were far in excess of said prewar averages.

Thus, the testimony was (R. 44):

> "Q136. How did the ceiling prices that were fixed for those spices compare with the average prices of those spices for a number of years prior to the war? A. All ceiling prices were considerably higher than the average prices before the war. Certain articles like cinnamon went up as much as six or seven hundred per cent. Nutmeg, went up about four hundred per cent. Mace went up about one to two hundred per cent. I could go on that

way, but I think that gives you an idea. Ginger went up two hundred per cen

Q137. Is that illustrative what happened in the whole line of prices on s ces? A. Yes, sir."

If pepper had been treated exactly as the many other spices were treated, the ceiling price would have been fixed at from 30 to 40 cents per pound (R. 54).

O.P.A. agreed to an arrangement with respect to cinnamon to permit, and which did permit, the importation into this country of Indian cinnamon from the Island of Ceylon and which provided a fair supply to cinnamon users during the War (Tr. 77-78), but refused to permit a similar arrangement with respect to the importation of Black Pepper (Spec. Fdg. 23, R. 21) sought by the Combined Food Control Board and by the Department of Agriculture (Tr. 77-78).

Thus, cinnamon, which had sold for from 12 to 15 cents a pound immediately before the War, was allowed an O.P.A. ceiling price of from 55 to 60 cents a pound (Tr. 78-79). But pepper which was selling at 6¾ cents immediately prior to the War, was denied a ceiling price sufficient to bring in Indian Pepper, which was selling at 21 cents, delivered in New York (Spec. Fdg. 23, R. 21).

O.P.A. broke its agreement with the Spice Trade by the above refusal (R. 88). Of course, the Spice Trade recognized that when the supplies of spices on hand in the United States were used up, they would have to pay prices sufficiently high to bring about exports to the United States from those countries which were not cut off by the War.

In the case of pepper, as there was a large supply on hand at the beginning of the War (21 million pounds in the hands of Commodities alone) (Spec. Fdgs. 5 and 8, R. 13-14, 15), and as the frightened Indonesians were dumping their pepper on the New York market (R. 108-109) at such a rate that there was 78 to 100 million pounds in the hands of importers in March, 1942 (Spec. Fdg. 8,

R. 15), the Spice Trade (not including Commodities, which was never identified therewith), agreed to a ceiling price for pepper based on the immediate situation of huge supplies and large importations, but with the agreement on the part of O.P.A. that the price would be changed with the changing conditions which the trade foresaw (R. 88). But, despite the fact that the Spice Trade protested vigorously against the maintenance of the same ceiling price after conditions had changed completely, O.P.A. refused to budge (R. 88).

(j) The following matters also support the justness of Commodities' claims to 22 cents:

(a) The Spice Trade unanimously advocated a price of from 20 to 30 cents as a fair one (Spec. Fdg. 16, R. 18).

(b) The ceiling price in England was a shilling, despite the fact that England controlled the Indian production, the only production open to the allies (R. 79).

(c) The demand for pepper was so great and the supply so small that in certain countries where there was no price ceiling, the market was as high as $2.00 per pound (R. 62, 79).

But the Government's position seems to be wholly inconsistent. For, after stating that all the equities must be considered and the rights of the Government balanced against the rights of the owner of the property taken, it proceeds to disregard all of the equities, and to state that, regardless of equities and all other evidentiary matters, the ceiling price must control.

Stated briefly the Government's position is as follows: Having no answer to Commodities' proofs of value it has under the disarming title of "fairness

and equity" dragged in a lot of indefinite and irrelevant considerations, resorting even to flag-waving and slurs in an attempt to justify its ceiling-price yardstick for just compensation.

The Government, seeks to avoid the impact of practically the entire and undisputed evidence in the case. Upon its theory, just two facts are relevant:—the existence of the War and the fact that a ceiling price was established.

A large part of the Government's brief is devoted to a reiteration, which it substitutes for proof, that because the Administrator had fixed a ceiling price for pepper, such ceiling price was *fair and equitable*, and therefore the measure of just compensation not only when it was established, but for years afterwards, during which period all of the economic factors controlling value were greatly altered.

SECOND POINT.

Commodities had the right and the opportunity, despite all Government restrictions, including the 6½¢ ceiling price, of disposing of its pepper at the time of requisition for compensation far in excess of the ceiling price or of holding its property until the end of price control and of disposing of it for an even greater price. In such circumstances, the ceiling price is not even relevant.

The right of Commodities to sell its pepper in May 1944 for far more than 6½ cents per pound is shown in Commodities' Seventh Point, page 41 of its Main Brief, and the retention value of its property, or what it was worth in May 1944, based upon the price it could reasonably expect to obtain at the end of price control, is shown in Commodities' Tenth Point, page 53 of its Main Brief. Either of those rights makes the ceiling price wholly irrelevant.

A long line of decisions of this Court has established the general rule that one whose property has been requisitioned is entitled to just compensation measured by the value of his property at the time it was taken, based on what the owner lost, not what the value was to the Government.

United States v. *John J. Felin Co. Inc.*, 334 U. S. 624;
Seaboard Airline Ry. v. *United States*, 261 U. S. 299, 304;
United States v. *Miller*, 317 U. S. 369, 373;
Monongahela Nav. Co. v. *United States*, 148 U. S. 312, 326;
United States v. *New River Collieries Co.*, 262 U. S. 341, 343, and many others.

This rule is restated in the recent decision by this Court in *United States* v. *John J. Felin Company*, 334 U. S. 624, quoted *supra*, page 16. That is much more than Commodities claims in this case.

A modification, or a restriction, of this rule is that where proper Governmental action has reduced the value of property it is that reduced value which the Government is required to pay, and along this line a minority of the Court in the *Felin* case suggested that the ceiling price was the measure of just compensation where a dealer in perishable property suffers a requisition thereof. The ground for such opinion was that there was no outlet to the dealer, present or future, by which he could obtain more than the ceiling price for his property because being perishable and he being a dealer, he had to sell and he could not sell for more than the ceiling price.

In the case at bar the Government is asking this Court to hold that the ceiling price is the measure of just compensation, in a case where the owner of the property requisitioned had the opportunity to realize currently for his

property much more than the ceiling price, (Main brief, p. 41, *infra*, 54) and had the right and opportunity to hold his non-perishable and long-lasting commodity (Spec. Fdg. 25, R. 22) until the end of price control and obtain a high price therefor.

Moreover, the Government is asking this Court to apply such a rule to a non-essential condiment not in universal use but prized by epicures in the United States, and by large classes in tropical countries.

In all of the hundred citations and more of the Government, there is not a scintilla of support for such a claim. On the other hand, however, the recent decisions of this Court cited *supra* in this point and in the beginning of its argument are clearly to the contrary.

THIRD POINT.

The decision of this Court in United States v. New River Collieries Company, supra, is decisive upon the point that an established ceiling price does not measure "just compensation" where the owner of the property requisitioned can lawfully sell for more.

In *United States* v. *New River Collieries Company*, 262 U. S. 341, *supra*, a ceiling price under the Lever Act, which was no less sacrosanct than the Emergency Price Control Act, had been fixed, but an opportunity on the part of an owner of requisitioned property to sell lawfully at a price in excess of the ceiling price was held to give him the higher price as "just compensation" for his requisitioned property, despite the fact that he could not sell in the United States at more than the ceiling price.

In that case the facts were as follows: On various dates between September 17, 1919 and February 1, 1921, the United States requisitioned from the Collieries large quantities of coal for the use of the Navy.

While the price fixed by the Government for domestic sales prevented sales in the United States for a price higher than the established ceiling, the foreign market was higher. There was no prohibition against export and the *New River Collieries* had the opportunity to sell in this foreign or export market at a higher price than the ceiling price for domestic sales.

The Government sought to introduce in evidence the domestic ceiling price, and also evidence of the owner's cost of production, plus a reasonable profit. All of this evidence was excluded and the Court held that the Collieries Co. was entitled to the full amount for which it could legally have sold its coal.

The Court makes a number of statements which have been repeated with approval many times since, such as the following:

> "Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The War or the conditions which followed it did not suspend or affect these provisions. *United States* v. *Cohen Grocery Co.*, 225 U. S. 81, 88. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. • • •
>
> "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327."

and further:

> "The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned."

This case presents the converse of the question which has been asked so often by the Government and by the Courts in cases where an owner whose property had been requisitioned was not permitted to recover more than the ceiling or program price, such question being, why should the owner of property requisitioned by the Government be put in a better position than he would have been in if his property had not been requisitioned.

In the *New River Collieries* case the question was, why should one whose property was taken by the Government be put in a worse position than if it had not been taken.

That is the precise question which arises in the case at bar.

The case at bar is somewhat stronger than the *New River Collieries* case, in that the record in the latter case indicated that there was no opportunity for the New River Company to sell in the United States, except at or below the ceiling price. Its only opportunity to sell above that price was by shipping its coal abroad. Commodities also had the right to sell abroad at more than the 6½ cent price, but it had the additional right, which the New River Company did not have, of selling currently in the United States for far more than the said 6½ cent price, by converting to synthetic pepper, and by selling in less than one bag lots. See main brief, pages 42-43 and *infra*.

According to the Government, the ceiling price, which the plain language of the Emergency Price Control Act itself clearly indicates was never intended to be the measure of "just compensation", continues to be conclusively "*fair and equitable*", in the face of a mass of undisputed and indisputable evidence to the contrary.

Furthermore, the Government's appeal to the general equities of the situation to determine "just compensation"; rather than to rely on the established rules of law laid down by this Court, involves a novel, though convenient method of interpretation of what is fair and equitable.

"Just compensation" for requisitioned property, says the Government, is that amount which the taker of the property fixes. It is not necessary to consider the question of value. The fact that there were no sales at the price fixed for many months before and after the taking, is not evidence that the ceiling price was unfair, but only of the selfishness and lack of patriotism of all of the owners of pepper.

It is not too much to say, it seems, that if the Government's contention is written into the Law, that the Fifth Amendment to the Constitution, insofar as it requires "just compensation" to the owner for property taken, has been nullified, and the matter of "just compensation" becomes one for bureaucratic determination.

The Government concedes that War does not suspend the Constitutional provision for "just compensation" but it argues as though the O.P.A. did.

FOURTH POINT.

The sales of pepper at ceiling prices in December 1941 and in 1942 furnish no basis for determining market value or just compensation for pepper requisitioned on May 26, 1944.

The findings of the Court and the facts with respect to sales of pepper from the fixing of the first ceiling price in December 1941, to the increase to 10 cents in October 1944, are discussed in detail in Commodities' Main Brief, pp. 31 to 35.

The Government has avoided all detailed discussion of these facts, but persistently throughout its brief states that the reasonableness of the ceiling price was supported by sales made at that price. This, of course, had relation only to sales which had taken place long prior to the requisition here in question. But a complete change had taken place in the two years and more between March '42

and requisition, which prevented actual dealings at 6½¢ and rendered the prices of 1941 and early 1942 wholly inapplicable to May 1944 conditions. The change above referred to, which has already been stated in some detail, included the reduction of the three-year supply of pepper on hand in March 1942, which was practically all the pepper in the world at that time, to 28 million pounds, which was less than a year's supply for the continental United States (Spec. Fdgs. 8, 14, R. 15, 18); the using up of foreign supplies to such an extent that $2.00 a pound was the market price in countries where the price was not controlled (R. 72); and the destruction caused by the Japanese invasion (R. 102).

Market prices of an earlier or later date may be used as evidence of market value at the time of requisition only where it has been clearly shown that no change in conditions has taken place.

In *United States* v. *The Toronto Hamilton & Buffalo Navigation Co.*, decided only last month, Mr. Justice Clark put his finger exactly upon the office of past sales in connection with proving market value or just compensation. He said:

> "At times, however, peculiar circumstances may make it impossible to determine 'market value'. There may have been, for example, so few sales of similar property that we cannot predict with any assurance that the prices paid would have been repeated in the sale we postulate of the property taken. We then say that there is 'no market' for the property in question."

Thus, the past sales must furnish the basis for a prediction of sales prices at the time of requisition. Obviously, the sales in 1942, whether we consider them fair or unfair, furnish no basis upon which to formulate a prediction of the price at which sales in 1944 would take

place after there had been a complete change in conditions.

Furthermore, it is only a *fair* market value which is an indication of value and which is a basis for just compensation.

The Solicitor-General himself, in his statement of his contention with respect to the rule for determining "just compensation" says:

> "And, to the extent that the subsidiary standard of 'market value' is to be used, it must be a '*fair* market value,' from which all elements tending toward an inequitable result have been abstracted" (Br. 29).

Admitting the argument of the Solicitor-General that "the existence of actual dealings between willing buyers and sellers, leading to a real market value validates that *current* price as generally fair, just and reasonable, regardless of the particular owner's desires or intentions", the point of the case at bar is that there were few if any dealings between willing buyers and sellers at any time and none for months prior to May 1944. The sellers were not willing, even prior to February 1942. They were scared. The Indonesian sellers were scared by the imminence of the Japanese invasion, the American sellers by the hostility of Mr. Leon Henderson, the prohibitive margin requirements fixed at his demand, and the discouraging effect of the ceiling price (R. 89-90, 108-109). Moreover, the Solicitor-General himself points out (Br. 27-28) that "even in dealing with the accepted measure of 'market value,' the Court underscores the concept of "'*fair*' market value," and points out that '* * * strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value,

must *in fairness* be eliminated in a condemnation case * * * ' (317 U. S. at 375, italics supplied). Similarly, *United States ex rel T. V. A.* v. *Powelson, supra,* at 279-280, refers to considerations of 'equity and fair dealing' in determining proper measures of compensation."

It would not have been fair to have seized Commodities' stock of pepper which it had built up over nine years (Spec. Fdg. 5, R. 14) and to have compensated it at a temporarily depressed market (R. 26) price. Be that as it may, even this market had practically dried up by the middle of 1942, and there was no selling subsequent to September 30, 1943 (Spec. Fdgs. 14, 19, R. 18, 19). In July 1943 the Department of Agriculture was unable to purchase even a trifling amount of pepper to make good its lend lease commitments except by extraordinary means (R. 129).

The cases cited by the Government such as

Cudahy Bros. Co. v. *United States,* 155 F. (2) 905;
Graves v. *United States,* 62 F. Supp. 231;
Lessner Plumbing & Heating Co. v. *United States,* 64 F. Supp. 931;
Louisville Flying Service v. *United States,* 64 F. Supp. 938;
L. Vogelstein & Co. v. *United States,* 262 U. S. 337.

are not at all in point.

In those cases the Court found an actual active market and held that such market price measured the market value of the property seized and just compensation therefor.

FIFTH POINT.

The contention of the Government that Commodities should have attacked the ceiling price and have had its claim heard before the Emergency Court of Appeals and that not having done so is estopped, is without support in law, would be most unfair to persons whose property was requisitioned, and would be most disastrous to orderly and reasonable price fixing.

If Commodities had proceeded against the ceiling price of pepper by a demand for a hearing and an increase in price before the Administrator, and then, when he had refused the increase, had applied to the Emergency Court of Appeals, it would most certainly have been met by the defense that it was too late.

The ceiling price here in question was fixed in March 1942. Commodities had no reason to complain about it until demands were made upon it to part with its pepper in 1943. By that time, the sixty day period allowed for attacking a ceiling price had long passed. It is suggested that Commodities could have defeated that contention by alleging that changed conditions were the basis of its application. But, what changed conditions could Commodities have shown, or would it have been permitted to show with respect to production in Sumatra, Japanese destruction there, and other matters which would have affected the ceiling price?

Moreover, as above shown (pp. 7 to 8) no litigant has a fair opportunity in a fight with the Price Administrator.

Furthermore, as above shown, this Court reiterated in one of its most recent decisions, *United States* v. *Cors* (337 U. S. 325), its previous rules that one whose property is taken by the Government is entitled to a judicial determination of the just compensation which should be awarded him.

As shown in Commodities' main brief to this Court, in its Second Point (p. 25), the ceiling price could not be enjoined or set aside unless the complainant had established to the satisfaction of the Court that the order or Price Schedule was arbitrary or capricious. This places upon a litigant a burden much greater than that ordinarily imposed. In effect, it deprives him of his right to have the value of his property determined by the Court because it has been held in construing the provision above referred to, that the Court may not substitute its judgment for the judgment of the Administrator (*Madison Park Corporation* v. *Bowles*, 140 Fed. [2] 316). Therefore, in a trial before the Emergency Court of Appeals you do not necessarily get the judgment of that Court as to the value of the property or the fairness of the ceiling prices.

Furthermore, any such rule would be disastrous to price control, in case of another War, or in an emergency which required the fixing of thousands of prices in a short space of time. Consider what would happen if the view of the Solicitor-General is upheld.

In the case of the fixing of general ceiling prices for commodities of all kinds, it would be inevitable that many of such ceilings would cause injury to persons affected thereby, or many persons so affected might anticipate injury therefrom. In all such cases the person hurt or fearing injury would have to rush to the price-fixing body and demand a hearing and a change in the ceiling. The entire time of the Bureau would be consumed in hearing these complaints. It would, of course, deny most of them and petitioners would flock to the Emergency Court of Appeals and demand a review of the prices. The amount of litigation would doubtless be increased a hundredfold. The successful attacks on the ceiling price would usually result in the withdrawal or increase of the prices with respect to the entire industry, and many persons who had

low costs and were willing to sell at the ceiling prices, would get more.

A great many of the same ceiling prices would be under attack from some one or more of the persons affected thereby and the price scheme would be in doubt and business in confusion. Any merchant having goods of a class subject to a ceiling price which he knew was under attack would be loath to sell at that price until he knew the outcome of the attack.

It would be hard to imagine any rule of law or procedure that would cause a greater mess than that contended for by the Solicitor General.

On the other hand, the law which has been interpreted generally, as Commodities has interpreted it, has worked well. No one is compelled to attack it. The law, itself, provides that it does not require any one to sell at the ceiling price that does not wish to sell (Emergency Price Control Act, U. S. C. A. Title 50 App. Sec. 904[d], 56 Stat. 28).

So, unless his property is one which may under a broad interpretation, be required for the defense of the country, no property owner need be disturbed by a ceiling price and may hold his property. If his property does come under the class which permits its requisition under the broad terms of the October 16, 1941 Law he need not fly into Court to protect his rights against possible injury. He can wait until his property is requisitioned and then apply for just compensation. This means that in most cases instead of having a deluge of petitions and litigations during the War while the energies of the price-fixing Bureau are strained to the utmost to carry on their daily tasks, the determination of the fairness of prices is usually deferred until long after the War and after the emergency is past and when the fixing of a price by it, small or large, has no effect upon the War economy.

Moreover, the rule contended for by the Solicitor-General would be most unfair and burdensome to property owners affected by ceiling prices. A property owner who feels that the ceiling threatens him with loss must at a time when his force is depleted and when there are many dislocations in business, give his time and attention to an attack upon a ceiling price which may never injure him.

Furthermore, in making this attack, he is greatly hampered, for, bearing in mind that requisitions are restricted to the classes of property that directly or indirectly contribute to the War effort, it will be seen that much of the data necessary to prove the unfairness of a ceiling price may well be of a nature that it would not be in the public interest to disclose, and, furthermore, in time of War, evidence with respect to Government transactions and statistics are doubly difficult to obtain. Oftentimes the witnesses are not obtainable.

With this in mind, the Statute wisely gives one whose property has been taken six years within which to bring his suit, at which time the War will be over, the business conditions will have straightened themselves out, the claim can be considered on its merits, and without the hysteria which often enters into all human relations during time of War, and the evidence will be procurable without disclosure of matters which might be prejudicial.

SIXTH POINT.

No Distastrous consequences would result from permitting a court rather than O. P. A. to fix just compensation.

The Government's counsel has conjured up alleged disastrous results which would follow from this Court's permitting the Court of Claims or the Federal, District and Circuit Courts to determine just compensation where O.P.A. had fixed a ceiling price. He claims that inflation and many other serious results would follow such a course.

These are all pure figments of the imagination. Nothing of the kind could possibly follow. *In the first place,* let us assume that O.P.A. or other price-fixing body, is fairly competent and wishes to do a fair and just job. In such case the great majority of the ceiling prices would be fair, and being fair, there would undoubtedly be a market and requisition would not be necessary. As long as there were some who could make a profit at the ceiling price there would be sales.

It is a matter of common knowledge that in every business of any importance in the United States, in which large numbers of dealers, producers, or manufacturers were engaged, the costs of the various concerns would vary substantially, and that there would be a market for the product unless O.P.A., or the price-fixing agency fixed a ceiling price that was too low for the producers in the lowest cost bracket to make a profit.

If there were any substantial sales at or near the time of requisition the Court would hold that such sales measured the market value of the property requisitioned and limit "just compensation" to such prices.

Moreover, the just compensation which the Court will award must be assumed to be fair and just and that required by the Fifth Amendment. It is most unreasonable to suppose that the Courts will not be diligent to prevent unjust and invalid claims so that the net result of the Courts making their own determinations of just compensation instead of taking that of O.P.A. would never amount to more than just compensation based on all the relevant facts. Nor, would the matter of price regulation be upset by permitting persons whose property was requisitioned to obtain judgments of the Court as to the value of their property, rather than having the same fixed by O.P.A. ceiling price. There is certainly no threat to price fixing in the decisions of the Court of Claims on just compensation to date.

Furthermore, while price fixing covered almost all the products of trade and commerce the right to requisition was comparatively limited.

The right of the Government to requisition private property is restricted to those cases where directly or indirectly, the property sought may furnish some aid to the defense of the country (See Sec. 1, Act of Oct. 16th, 1941). This was held in the case of *Commodities Trading* v. *Federal Surplus Commodities Corp.*, referred to in Note (Gov. Br. 50). In many large fields where property is of a kind not required, directly or indirectly for the defense of the country, requisitioning cannot be called into play. Except munitions and certain metals which might be directly required for the defense of the country, most other classes of property would either be wholly exempt from requisition, or subject thereto to a small extent proportionably.

In the case of all, or most, foodstuffs grown in the United States, the farmer had a liberal price allowed to him which O.P.A. could not reduce.

While Government buying completely dominates munitions markets and may in a sense dominate some other markets in that it is so much larger than that of any individual buyer it is nevertheless only a small part of the total buying of any ordinary commodity. The buying necessary to feed and clothe the 144,000,000 people out of the armed services was many times that required to feed and clothe the average of 6,000,000 in those services. For the above reasons the percentage of cases where the Government would have to requisition would be small.

The refusal to sell in order to force requisition is no quick and easy road to gain.

Consider the provisions of the Act of October 16, 1941. An owner is offered a price. If he rejects that price he is not paid the higher or so-called inflationery price which he thinks his property is worth, but he is paid

on the basis of what the Government thinks it is worth, and only half of that. He then goes through a long and expensive routine of claims and demands and counter-demands, which are all futile and useless, and which end in a final determination that the O.P.A. price offered was fair and all that the Government should pay. His case has then reached the justiciable stage and he files his complaint with the Court of Claims, or in a District Court, and after months of litigation and expense, the amount of his just compensation is finally determined.

It is hard to see how the granting of such a right would upset the economy of the country or result in uncontrolled inflation.

In the case at bar it may be noted that instead of receiving the 50% of what the Government stated was the fair price of its pepper, Commodities received nothing until several weeks after it had brought suit, and more than eighteen months after its property had been seized (Spec. Fdg. 7, R. 14, 15).

To sum up, if we assume that the great majority of the ceiling prices are fair, there would certainly be no need for requisition, because the owner would sell. Even if prices were not fair to all owners, unless the trade were a very small and restricted one, like pepper, there would be a substantial number of sales by persons who had low prices, and this would fix a market which would limit the recovery of the dissatisfied owners.

In those cases where the property is subject to seizure any litigant would accept the ceiling price if it were anywhere near fair or just rather than be put to the trouble and expense of a litigation. Refusals to accept the ceiling price and a resort to the Courts could arise only in those cases where the ceiling price was manifestly far below just compensation.

SEVENTH POINT.

Plaintiff's claim does not include any element of increase in price due to the need of the Government or even due to our War.

As above stated, plaintiff's claim is for 22 cents a pound only, at a time when pepper was selling for $2.00 a pound, where there was no price control (R. 79). This would discount many times any possible element of value due to the War in general, or to the Government's need of this particular article. However, without regard to the said discount, neither of those elements would have affected appreciably the price of Whole Black Pepper in the United States.

In the first place, pepper was not an article required for War, and the demand therefor in May 1944 was not increased by the War. That is to say, pepper was used by the Government in no other way than by ordinary civilians, namely, as a condiment in connection with food.

The Government's takings of pepper did not increase the general demand therefore. Pepper is a commodity which is in use by a large percentage of all the 150 million people in the United States.

The demands of the Government with respect to approximately 10 million people in the Army and Navy, most of whom probably consumed pepper before they were inducted into service, could not have had any appreciable effect upon the entire national demand. On the other hand, the demand was actually greatly reduced by the rationing of pepper and permitting grinders to sell in 1944 only 40 per cent. of their prewar sales (Spec. Fdg. 13, R. 17-18). Moreover, pepper has a worldwide use and a world market (R. 40-41) and any increased use of pepper for Army consumption would be negligible on the total world demand and world supply.

The reason for the shortage of pepper in the United States in May 1944, other than the refusal of O. P. A. to admit Indian pepper, above referred to, was the fact that the great pepper producing section of the world, Sumatra, was in the hands of the Japanese (R. 46, 102).

Does the "just compensation" provided for by the Fifth Amendment contemplate the elimination from allowances therefor may element of value or price which may have resulted from a foreign War?

In was not *our* War with Japan that made pepper so scarce in the United States. It was the War declared upon Holland by the Japanese, and particularly its invasion and seizure of the Indonesian Islands (R. 46, 102). There would doubtless have been the same scarcity of pepper in the United States if it had remained out of the World War, and if the War had been confined to Germany, Italy and Japan against the other countries which participated therein, exclusive of the United States (Spec. Fdg. 26, R. 22-23, also Spec. Fdg. 9, R. 16, 81, 99-100, 101-102, 107).

On the other hand, if Japan had not been at War with Holland, there would have been no trouble in our obtaining pepper from Sumatra. We were able to get supplies of all kinds from India without difficulty.

Commodities submits that to hold that any increase in the price or value of pepper due to the War should be eliminated in determining just compensation, would be taking a long step away from the intent of the Fifth Amendment.

Commodities, further submits that any increase in the value of pepper, due to the destruction caused by the Japanese, is another factor of value, which should not be eliminated. This destruction caused a worldwide shortage and a worldwide increase in price, particularly following the War (R. 46, 102). That this would take place was well known in May 1944, and an allowance for "just com-

pensation" should not exclude a consideration of these circumstances.

However, as shown in the following point, Commodities' claim is restricted to a value which its pepper would have had, even if there had been no War.

EIGHTH POINT.

Commodities is entitled, as a minimum, to the value which its pepper would have had in May 1944, if there had been no War.

This point has been discussed in Commodities' Main Brief, Point IX, and has also been alluded to in Section (h) of Commodities' First Point in this Brief, on "general equities", and will not be discussed at length here. But, as Commodities considers this a point of importance, it wishes to stress it and will make the following brief statement.

The Government has condemned the above Point as purely hypothetical, and says that there *was* a War. There are, however, many matters connected with this point which are not hypothetical:

The Japanese destruction in Sumatra (R. 46, 102) was partly responsible for the high prices of pepper that obtained at the end of the War, but only partially responsible therefor.

The five year failure of the Sumatran growers to plant new pepper, and their neglect of the established gardens would have brought about prices higher than 20 cents a pound, even if there had been no War (Spec. Fdg. 9, 26, R. 16, 22-23, 45, 66-68, 81, 98-102, 107).

As shown in Commodities' Bain Brief, page 53, the above cessation of planting had already caused a falling off of 40 per cent. in production, and was sure to bring out a much greater falling off in the future, and that a

shortage of pepper would exist for approximately seven years after the natives returned to planting.

The Court of Claims found that this would have brought about prices higher than the 6½ cent ceiling price, but did not find a definite figure (Spec. Fdg. 26, R. 22-23). The evidence shows, however, that this price would be in excess of 20 cents (see Main Brief, pp. 48-53).

Now, even if the profit is to be taken out of War, and no advantage allowed which comes directly or indirectly therefrom, it would be the height of injustice and inequity to disallow that part of the increase over 6½ cents which would have taken place in the price and value of pepper, if there had been no War.

Commodities submits that this is a sound and conclusive argument in any view of "just compensation", but the argument becomes the stronger in view of the stress which the Government has put upon fairness and equity.

Moreover, the force of the Government's criticism of this Point (Br. 94 *et seq.*) is destroyed by the fact that it cites, in support of its argument that "just compensation" must not include War profits, the British Indemnity Act of 1920, which provided that compensation for the taking of vesels should take account of the profits which the owner would have made if there had been no War, and not take account of any increase of market values of tonnage or rates of hire due to the War (Government's Brief, p. 86).

NINTH POINT.

The ceiling price for imitation pepper furnishes a measure of the value of Commodities pepper.

The Court of Claims found:

> "18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and

sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agents.

This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound" (R. 18-19).

The Attorney General, in the Government's brief to this Court, in opposition to Commodities on application for certiorari in Case No. 163 stated at page 6:

"(2) Comparison with the net price for whole black pepper used in producing imitation black pepper similarly has no place here, for imitation black pepper is a different commodity from whole black pepper, and like whole black pepper, was subject to an OPA price ceiling. Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured product was established on a different basis from those for products traded prior to the imposition of price controls. See Section 202 of the Emergency Price Control Act of 1942, 50 U. S. C. App. 922."

The answer to the above was obvious and simple. Commodities having proven the existence of a large market, and of dealings in synthetic or imitation pepper, and that O.P.A. had established a ceiling price therefor (Spec. Fdg. 18, R. 18-19), it must be assumed that Commodities had a right to engage in this business.

It was the duty of the Government to prove any obstructions or prohibitions if they existed. It was not the

uty of Commodities to prove a negative and show that here were no prohibitions. How would an American citizen go about proving that he could lawfully engage in new business?

In his brief upon this appeal, the Solicitor General has shifted his position somewhat and now says:

> "Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured product was established on a different basis—cost of manufacture plus a fair profit—from those for products traded prior to the imposition of price controls. See Section 2 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 902 (a). Despite the 30-cents-per-pound price Commodities now says it could easily have secured by manufacturing imitation black pepper (Br. 6, 12, 40, 56), the record contains nothing to indicate that it was ever anything but a speculator or "investor" in pepper, or that it desired or was able to do this type of manufacturing, or what it would cost it to make the synthetic product. By its own admission, Commodities has never associated with the spice trade generally (Pet. 39); 'it was in no sense a regular commercial undertaking' (R. 52). Indeed, there is nothing to show that Commodities ever engaged in grinding pepper, or other spice processing of any kind, that it ever attempted or desired to enter this field, or that, in wartime, it could have secured the equipment or facilities necessary to have done so. This special ceiling price, then, was not in reality available to Commodities—as is proved by its own failure to take advantage of a very high price it now says it could easily have secured—and it is wholly irrelevant to the present proceeding" (Br. 111-112).

The above is equally fallacious. The synthetic business was available to Commodities. The fact that it had never engaged in anything but very large transactions in connection with the importing and selling of pepper, and that it had had no intention of becoming a regular dealer or of associating itself with the pepper trade prior to the War (Spec. Fdg. 5, R. 14, 25, 53) is no reason why when the Government prevented it from carrying on the business that it desired to carry on, it could not turn to a new business and employ its large inventory therein.

Commodities repeats that it was not for it to show it could engage in a new business in which others were engaging, but it was the Government's duty to prove to the contrary if it could produce any facts to sustain such a contention.

The suggestion that in Wartime it could not have secured the facilities or equipment necessary to grind its pepper is most far-fetched. The record shows that there was approximately 30,000,000 pounds of whole black pepper consumed in the United States annually (Spec. Fdg. 8, R. 15), but it was not consumed in that form. It was in most cases ground and the importers sell their pepper to grinders and packers (R. 128).

The complaint which brought about the attempt of the Government to seize all of plaintiff's pepper for civilian use was that the packers and grinders could not obtain the pepper to grind (R. 128-129).

There were, of course, ample facilities and there was no law against Commodities having its pepper ground for it by any one having the facilities. There was no obstacle to starting a new business such as might obtain in the ordinary case. Here was a case where there was a tremendous demand and none of the ordinary expenses of engaging in a new business such as advertising and creating a clientele would have been necessary. As stated by defendant's witness, Squires, Chief of Spice Section

of O.P.A., if any dealer could have sold ground pepper for 12¢ a pound legally a line would have formed in front of his place. He would not have had to look up any customers (R. 106).

While this had reference to the ceiling price of 12½¢ which O.P.A. maintained on ground black pepper, it shows how great was the demand.

The Solicitor General closes his argument as follows:

> "This special ceiling price thus was not in reality available to Commodities, as proof of its own failure to take advantage of the very high price it could easily have secured and it is wholly irrelevant to the present proceeding" (Br. 112).

The reason why Commodities did not take advantage of this is not shown. There are many possible reasons. Among them was the fact that pepper at that time was selling for $2.00 in uncontrolled markets (R. 72). Commodities knew that there would be a great scarcity at the end of the War and possibly considered that it could make far more by holding its pepper than by converting it into this synthetic mixture. The price at the end of the War was 50¢ to 60¢ but soon rose to 80¢ (Spec. Fdg. 17, R. 18, 40).

Moreover, Commodities would not have been in a desirable position if it had parted with its pepper at that time (the spring of 1944) even if it could have done so legally. It must be remembered that on March 13, 1944 a large quantity of Commodities' pepper was put under requisition by the War Food Board. While Commodities obtained an injunction prohibiting the removal of the pepper from the Warehouse it had only a temporary injunction and the Judgment of the United States District Court that the Second War Powers Act did not authorize the requisitioning of the pepper for Civilian consumption was not rendered until July, 1944. It would not have

been in a pleasant position if it had parted with its pepper under such circumstances and if the Court had upheld the Food Board. While the particular requisition which was enjoined included only 3,964,800 pounds of pepper, the papers in the case showed that it was the intention of the Government to requisition, and that requisition had been provided for, with respect to practically all of the whole black pepper in the hands of Commodities and all other importers (Affidavit of Olmstead, R. 130-131, *Commodities Trading Corp.* v. *Federal Surplus Commodities Corp., et al.*, U. S. D. C., for Dist. of Col. Civil Action No. 23573).

In view of the proof in the record and the finding of the Court of Claims, this Court must consider that there was no physical or legal obstacle to Commodities engaging in this business. This point is of the greatest importance in view of the concurring opinion in the *Felin* case, in which the Justices joining therein proposed the ceiling price as the measure of just compensation to *Felin* because he had no outlet at any higher price and had to sell.

Here, Commodities was in the favorable position of being able to hold its pepper until the end of price control and then selling or of converting it promptly into imitation pepper and taking advantage of an immediate outlet more than four times as high as the ceiling price.

The Solicitor-General states (Br. 112), that real ground pepper was closely analogous to whole black pepper and that the ceiling price on the ground pepper of 12½¢ supports the fairness of the 6½¢ price on whole black pepper.

The Government's trial counsel sought to show what the Solicitor General here states, but on cross-examination, Squires admitted that there would be no cost of sales, as a line would form in front of the premises of any dealer who had ground black pepper to sell at 12½¢ a pound (R. 106).

Moreover, as above stated, page 15, when the O.P.A. increased the price of pepper from 6½¢ to 10¢ it made no increase to the packers of pepper, as it stated that they were making sufficient profit to absorb the increase (Regulation 52, as amended October 9, 1944). The increase was approximately 60%, all of which they had to stand.

TENTH POINT.

The other opportunities to sell at far above the 6½ cent price destroy the force of that ceiling and furnish an additional measure of the value of Commodities pepper.

The Solicitor General argues that because Commodities never sought to bring itself within the limited classes covered by other ceilings they are wholly inappropriate to measure just compensation for its pepper (Br. 110 *et. seq.*). This, Commodities submits, is an obvious *non sequitur*. Commodities did not wish to sell its pepper to anybody, but wished to hold its pepper until the turn of the cycle for high prices (R. 52-53, Spec. Fdg. 8, R. 15), but the fact that it had the right to bring itself within the classes referred to is of great importance in showing the price at which Commodities could have sold its pepper at the time of seizure in the United States if it had so desired, and this distinguishes this case completely from the *Felin* case.

Here, as already stated, Commodities did not have to sell and if it wished to sell it could have put its pepper out through channels where much higher prices prevailed than the 6½¢ price.

The exception from the general price ceiling of sales of less than one bag (O.P.A. Reg. 52) is a matter of importance with respect to the price at which Commodities' pepper could have been disposed of. It had the right to sell 125 pounds of pepper, or even slightly more, to any quali-

fied purchaser without coming under the prohibition of O.P.A. Regulation No. 52.

The Solicitor General says the right to sell this small quantity has no bearing on the requisition of 759,000 pounds (Br. 111). Commodities submits that the fact is just to the contrary. Hundreds of vessels left New York Harbor every week. These vessels furnished an outlet for tens of thousands of pounds per week, but dozens of other Ports were also clearing large numbers of vessels.

Moreover, these less than one bag lots were not limited to vessels and could have been sold to American National Red Cross and many other public or quasi-public agencies. The American Red Cross was supplying not only the Armed Forces, but the persons of devastated countries and had a great output of food stuffs, and F.D.O. 19 not only permitted Commodities to make deliveries in less than one bag lots directly to these people, but permitted it to deliver to any one "for replacing in his inventory any restricted spice so delivered or used", so that any grinder who had delivered to any of the Governmental Agencies, or who had delivered to the Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any of the other Governmental Agencies mentioned, or to the Red Cross, or to Steamships, could replenish his inventory by purchasing from Commodities, and if these purchases were in less than one bag lots, say 125 pounds (see Commodities Main Brief 43-44), they would be free from the O.P.A. 6½¢ ceiling price.

The Solicitor General argues that the cost of making these sales would eat up the difference in ceiling price (pp. 112-113). There is nothing whatever to this argument. At a time when people wanted pepper and where unrestricted by their governments, were paying $2. a pound for it (R. 62), no advertising or sales expense would be necessary to sell any amount within reason at 20 cents (R. 106).

ELEVENTH POINT.

Commodities Pepper had a retention value in excess of 22¢ a pound which should have been allowed in finding just compensation.

The Solicitor-General does not answer, or even attempt to answer directly the facts and arguments made by Commodities on this subject, in its main brief (pp. 35 to 41), but makes the general statement that the course of prices, once the market is free, "lies in the domain of inspired prophesy, rather than of fact-oriented judgment General experience with economic forecast, and especially in a period of great flux, does not justify an attempt by the Courts required to make evaluations as of the midst of the war to foretell market or business conditions several years in the future" (Gov. Br., 68-69).

Where there is no current market, value is always an estimate based on provable facts, "Retention" value is no exception, Commodities has proved the facts. As pointed out in Commodities' main brief, pages 35 to 41, the factors which in some cases may lie "in the domain of inspired prophesy" were, in the case at bar, founded upon definite and immutable facts.

The following is not prophecy inspired or otherwise: The price of pepper dropped from 42¢ to 3¢ in a few years with no substantial recovery. Because of this the natives planted no new pepper vines for the five years immediately preceding the war and allowed established gardens to be swallowed up by the jungle (R. 101-102). As it takes the pepper vine seven years to reach its normal bearing capacity, and four years to yield any crop at all ,it is obvious that even if the natives had changed their attitude immediately upon the Japanese invasion, and had started to plant pepper in 1942, those vines would have produced no pepper prior to 1946 and little pepper prior to 1949 (R. 99-102).

All of the foregoing statements of this paragraph are acts, facts which were all known before the War, and immutable.

Moreover, the heavy production in 1935, 36, 37 and 38, which beat the price down to the unprecedented low of 3 cents a pound from the unprecedented high of 42 cents in 1928 and 1929, was due to the heavy plantings in 1926, 27 and 28 indulged in by the Sumatra natives inspired by the high prices of those years. But the evidence was clear, and the Court of Claims found that the pepper vine did not continue to bear beyond fifteen years after the date of planting (Spec. Fdg. 26, R. 22, 43, 66-68, 101-102). Of course, this ceasing to bear does not happen suddenly, but is a tapering off, so that by 1942 most of the 1926-1928 heavy planting had ceased to produce and production was down 40% (R. 100). By 1944 all of it would have ceased.

None of the above is "inspired prophesy" but was an immutable fact, so that even had there been no war, there would have been a scarcity (Fdg. R. 43, 66-68, 101-102).

Added to the above, was the further fact of great Japanese destruction (R. 45, 102).

Here, again, we have no prophesy, but a definite actual fact. This made it doubly certain that there would be a dearth of pepper in the world for at least seven years after the Japanese invasion (R. 102) up to which time it was known that there had been no new plantings since 1936 (R. 101-102).

The world shortage which has actually occurred and has kept prices in the neighborhood of $1.00 a pound was inevitable in 1944.

Prices, of course, result from supply and demand. The supply was short in 1944 and was bound to remain so until 1949. Moreover the proof was clear that the demand would be there. Pepper has been used all over the civilized world for more than three thousand years. The demand is not affected by the price. This is due to the

fact that there is no substitute and that the use is so small (one-eighth of a pound per year per person) (R. 50), that price is a matter of no consequence to anyone who wishes to use the condiment (R. 50).

With a definite shortage of supply and a definite demand (R. 45, 89, 68), there was no element of prophesy in 1944 in stating that the price would be high at the end of control. The only element of prophesy lay in how high. A crop failure for one year in 1926 sent the price to above 42 cents and kept it at an average price far above 30 cents for three or four years (see Fdgs. 9 and 26, R. 16 and 22). For seventy-five years every time there has been a shortage pepper has risen to 20¢ or more (Fdgs. 9 and 26).

Commodities submits that there was no element of "inspired prophesy" in the prediction by any one familiar with the pepper market and pepper conditions that the prices following decontrol would be in excess of 22 cents per pound. A price far in excess of 30¢ was the unanimous prediction of the spice trade (Spec. Fdg. 16, R. 18). A price of 50¢ to 60¢ actually followed decontrol (Fdg. 17, R. 18) with an 80¢ price soon after* (R. 40).

The Solicitor-General misinterprets "retention value". If there is an actual fair market at the time of taking that is the measure of value. Retention value does not exist except in those cases where there is no fair market. It is usually invoked where such market does not exist by reason of governmental interference. Then the Courts properly take into account the value of the property, less the depressing effects of governmental restrictions and where

*Note—While the course of pepper prices which actually followed decontrol may be said to be hindsight, hindsight may properly be resorted to in cases of condemnation. Orgel on Valuation under Eminent Domain, page 88; *City of Los Angeles* v. *Pomeroy*, 124 Cal. 507; *Tyson Creek* v. *Empire*, 31 Idaho, 580; *Matter of Board of Water Supply*, 209 A. D. 213 (N. Y.). *In the Matter of the People of New York, etc.*, 81 Misc. 324 (N. Y.). Moreover, the right to judge a claim by what has actually happened is the stronger in a case like the one at bar, where the Government insists that there are no definite rules to go by and that simple equity is the only guide.

there is a world market, a world shortage and an ability in the owner to hold until decontrol this retention value is very real and important.

The inclusion of "retention value" is not unfair to the public or other traders. The excess over the ceiling price added by such "retention value" would not normally be an anticipated increment due to a war caused postwar inflationary rise. On the contrary, under the Emergency Price Control Law, ceiling prices did not end with the war, but were continued until there was a reasonable adjustment of prices. Ordinarily, the postwar price would be the prewar price, plus such increases in labor and other costs which had taken place during the war, or as a result thereof.

Retention value is that value, remaining after the depressing effect of Government restrictions have been taken out. Such value adheres to the property because such restrictions are but temporary and the future high market is certain and the property does not depreciate.

The Government claims that retention value is too speculative (Br. 68). It says, quite correctly, that just compensation is to be determined by value at the time of taking. This, Commodities has always conceded, and this the Court of Claims fully recognized. Otherwise, it would have allowed 50¢ and not 15¢ as retention value for Commodities pepper. In most cases retention value is speculative. It is speculative in this case to a limited extent. That is, no one knew in 1944 that the price of pepper would be 80¢ a pound in 1947 (R. 40). and that it would be in the neighborhood of $1.00 a pound four years following the end of price control. Commodities has claimed no such amount as just compensation. What it has claimed is only the amount that could reasonably have been foreseen as the minimum price.

The Court of Claims has taken into account in fixing retention value even the matter of possible obsolescence.

Kaiser v. *United States*, 69 F. Supp. 588;
Pantex Pressing Machine Co. v. *United States*,
71 F. Supp. 859.

In the case of pepper, however, it has been an article desired by epicures for more than three thousand years. There was no chance in 1944 that the demand for pepper, which extends to nearly every part of the civilized world, would cease or slacken.

As already shown in our main brief (p. 56), the consumption is so small, only ⅛th of a pound per person per annum, that it makes little difference to the ordinary individual whether the price be 6¢ or 60¢ per pound.

On the other hand, it was equally certain that at the end of price control there would be an insufficient supply to meet the normal demand. Thus, in May, 1944 it was plain to every one that the world, except India and Sumatra, had been swept clean of pepper (R. 44-45). Prices as high as $2 per pound for a commodity which usually sells for from 12¢ to 25¢ a pound constitute proof of an extreme scarcity (R. 62, 79).

The low prices which had prevailed for six or seven years preceding our entry into the World War had put a stop to new plantings in the producing countries and had even led to the abandonment of established gardens (see Point IX, main brief).

With the facts established that there would be a great demand and that the supply would be much less than normal, high prices were an inevitable consequence. The chart of prices for 75 years back, found by the Court of Claims in its Ninth Finding (R. 15-16), showed that every time there had been a shortage of pepper, prices rose rapidly and rose to prices usually substantially in excess of 20¢ a pound

Besides these facts, which were definite and clear, was the fact that the entire Spice Trade believed that the O.P.A. ceiling price was unfair and would result in prices

much higher than 30¢ per pound at the time of decontrol (Spec. Fdg. 16, R. 18, 114). This was no "inspired prophecy", but the unanimous opinion of the persons having the best information on the subject.

On the other hand, as shown in Commodities main brief (p. 57), the cost of carrying the pepper was small and the end of the War was in sight, so that it would not be necessary to make a large deduction from the 30¢-plus price to ascertain what Commodities could obtain net by carrying their pepper to the end of price control.

TWELFTH POINT.

Commodities' sales at 10 cents, subsequent to October, 1944, and its negotiations to sell to the Army for 9¾ cents were not relevant, and should not be considered in determining the value of Commodities' Pepper in May 1944.

At page 108 of its Brief, the Government refers to these "domestic sales at 10 cents a pound" and Commodities' offer to sell a million pounds of pepper to the War Department at 9¾ cents a pound, and states that they indicate "that Commodities own contemporaneous valuation of the pepper was substantially lower than the amount fixed by the Court of Claims."

There is no support for that statement and it is completely refuted by the proven facts.

Commodities did offer to sell to the Army a million pounds of pepper for 9¾ cents a pound.

While this letter was largely a patriotic action on the part of Commodities, it was not wholly so, and it was not a voluntary offer on the part of Commodities. It was really the acceptance of the offer of the Army to purchase at that price and was couched in that language to comply with Army formalities and to avoid violating the O.P.A. Regulations (Spec. Fdg. 22, R. 21).

Moreover, Commodities knew that if it did not sell to the Army at an agreed price, approved by O.P.A., its property would be requisitioned, it would be paid 3¼ cents and it would have the right to fight in the Courts, perhaps for years, to get any more thn that, with the knowledge that O.P.A. was insisting upon the maintenance of its 6½ cent ceiling price as payment in all cases. Besides this was seven months prior to the requisition in question.

With respect to the heavy sales at 10 cents, they do not indicate sales by a willing seller or Commodities' "contemporaneous valuation of its pepper", they indicate that Commodities was in a highly dangerous position, knew it, and was willing to make a compromise. Also that it sought to avoid the odium which the O.P.A. was casting upon it.

The situation in October 1944 was as follows:

Colonel Olmstead, Deputy Director of the Office of Distribution of the War Food Administration in the United States Department of Agriculture, and Chairman of the Inter-Agency Food Procurement Committee, having charge of the procurements of foodstuffs, had reported that 22 million pounds of Whole Black Pepper was essential to the defense of the United States, and that such amount be requisitioned in short order (R. 130-131).

In carrying out that program, 3,964,800 pounds of Commodities' pepper had actually been requisitioned on March 13th, 1944 (R. 126). While Commodities obtained a temporary injunction and had defeated the Government's motion for summary judgment made on the ground that there was no issue of fact between the parties, and that the requisition was authorized by law, the United States District Court for the District of Columbia, having held in July, 1944, that the Second War Powers Act did not authorize any such procedure on the part of the Government as the requistioning of pepper for civilian consumption.

Nevertheless, this was only a temporary injunction and a decision of the District Court (*Commodities Trading Corp.* v. *Federal Surplus Commodities Corp.*, Civil Action No. 23573, U. S. D. C. D. C.).

It was Wartime, and Commodities' case was one of the very few in which a Government requisition had been enjoined. Commodities was in the position where 16 million pounds of its pepper might have been taken by the Government and payment therefor made at the rate of 3¼ cents per pound at best, and at no payment if the practice followed in the case at bar had been adhered to, where nothing was paid until eighteen months after requisition (Spec. Fdg. 7, R. 15).

It would then have faced the bank with a claim against the government instead of with valid collateral for a loan and would have had a claim of such magnitude that any Court would have been astute to apply the strictest measures of compensation, with a long fight and a doubtful right of appeal to this Court ahead of it.

Of course, Commodities could not agree to sell and could not sell millions of pounds of its pepper with the requisition hanging over it and as it is an official matter, within the knowledge of the Government, it may be proper for Commodities to state here that as a part of this transaction the requisition was withdrawn and the injunction suit discontinued, which relieved Commodities from the threat of the taking of the rest of its pepper.

Commodities obviously was willing to sacrifice a part of its holdings at an inadequate price, in order to improve its chances of holding the balance until decontrol, and getting the high price which it knew would obtain at that time. However, as the Government itself points out, these sales took place five months after the requisitioning here in question, and should not be considered as relevant.

THIRTEENTH POINT.

Findings of the Court of Claims support an award far in excess of the 15 cents per pound allowed and in excess of the 22 cents per pound demanded in the complaint.

The findings of the Court of Claims in its 9th Finding, taken in connection with its 26th Finding, show that the price of pepper would have been in excess of 20 cents a pound in May 1944, had there been no War.

Thus, the 9th Finding shows by a graph the great variations in price which had taken place over the last 75 years. The 26th Finding explains the reasons for these variations and shows that:

> "The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines. The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942. If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (R. 22-23).

The prices for pepper found in the 9th Finding were lower than any shown on the chart except 1936-1940. Consequently, it is fair to assume that the effect of these prices on failure to plant and neglect of gardens was at least equal to what had taken place in the past, and that the effect on increasing prices would be the same. That this was the intention of the Court is plain from its opinion, which states:

> "When prices are high the natives plant pepper; but when prices decline, they neglect their vines and allow them to be destroyed by the encroachment of the jungle. The resulting scarcity causes the market to rise. Prices stay high for several years because it takes about 4 years for a pepper vine to bear.
>
> "Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come" (R. 26).

While the Court finds no figures, it is fair to assume from the above that it meant to find that history would repeat itself and a rise, similar to that which had taken place in the past, would follow 1941. If that had happened, the price would have risen to 20 or 25 cents by 1944 (see chart). Commodities submits that the above subordinate findings require an allowance for just compensation of 20¢ or more.

The evidence was much stronger than the Finding. It showed an absolute cessation of planting for five years prior to the War and neglect of pepper gardens, which permitted the over-running of many by the jungle, with a consequent reduction in production of 40 per cent. This evidence was all undisputed, and the Court of Claims failed

to find the same. Error is assigned to each of such failures.

The comments of the Government's counsel (Br. 96-98) on the fact that the cycle of return to high prices from low had not taken place as rapidly in the cycle beginning shortly before the War as in preceding cycles is entirely irrelevant. Of course a drop from 42¢ to 3¢, the greatest in history, would naturally take longer than a drop from 25¢ to 6¢, as was more common, but by the same token, when the rise started, it went quickly, and if the next ceiling price after 1941, assuming there had been no War was to be 40¢, it would probably have reached that point by 1945.

The Government says (Br. 97) that Commodities made the mistake of beginning its operations too soon in 1933 when it should have waited until 1938 or 1939. A wise investor does not try to hit the very bottom. When prices are low enough he begins to buy. Commodities could not possibly have accumulated 25,000,000 pounds of pepper for the price it paid if it had waited for the bottom to begin its purchasing.

However that may be, the fact that there had to be a rise in prices from those of 1941 and quickly was as plain and immutable as the multiplication table. There was bound to come a period not much later than 1942 when for a stretch of five or six years there would be practically no pepper production. With this fact, there was bound to be a high price.

If this Court should feel that the findings of the Court of Claims are insufficient on this point, it should not make a judgment in the face of the undisputed facts shown by the record, but should require additional findings, or send the case back for another hearing.

The retention value of plaintiff's pepper sustains the 15 cent price and requires an allowance of the full 22 cents asked in the complaint.

Commodities is on somewhat firmer ground in this point. It has all of the advantage of what was shown and found with respect to what would have happened if there had been no War, but it had the added fact of the destruction caused by the Japanese and the findings of the Court of Claims that the Advisory Committee of the Spice Trade had predicted prices far in excess of 30 cents a pound if O.P.A. refused to let in the Indian pepper. O.P.A. did refuse and the price shot up to 50 cents to 60 cents per pound immediately after price control ceased and soon to 80 cents (Spec. Fdgs. 16 and 17, R. 18 and R. 26).

The opinion of the Court of Claims stated:

> "A very great increase in price was inevitable upon the removal of restrictions. The price of pepper had greatly declined in 1935 and 1936 and was still down when the ceiling price was fixed. This resulted in but little planting and in neglect of growing vines, which resulted in turn in a scarcity. In addition to this, the Japanese invasion of Indo China and Sumatra further reduced the supply. These factors made it inevitable that there would be a very great increase in the price after restrictions were removed" (R. 26).

This statement explained Findings 16 and 17 and shows that the Court there intended to find, for which it had ample evidence, that it was reasonably certain in May, 1944, that the prices following the War would be in excess of 30 cents per pound.

The cost of Commodities' pepper fully sustains the 15 cent price and would sustain a much higher price. The Court of Claims found a price of 12.7 cents, but in its findings and in enumerating the factors it considered, it

stated that it had excluded many factors that should have been included, and the finding showed on its face that allowances for many items were obviously much too low. The ajustment of these items would bring the cost well over 15 cents and the allowance of reasonable general overheads, which the Court of Claims did not allow at all, would bring the cost to at least 20 cents. This is discussed more fully in the Main Brief, p. 58, Point 12.

The market price of Indian pepper should have been taken as a fair measure of the value of Commodities' pepper, particularly in view of the fact that O.P.A. permitted the importation of large quantities of this pepper at prices of 23 cents or thereabouts as soon as Commodities had disposed of most of its pepper under its agreement with O.P.A.

Finally, the opportunity of Commodities to convert its pepper into synthetic or imitation pepper and sell it at a net price far in excess of 20 cents a pound (Spec. Fdg. 18, R. 18 and 19) fully sustains a price in excess of 22¢ (see discussion Main Brief, Seventh Point, and *supra*, pp. 48 to 54).

CONCLUSION.

The Court should direct judgment in accordance with the prayer of the complaint.

Respectfully submitted,

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January 9th, 1950.

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 156.

THE UNITED STATES,

Petitioner,

v.

COMMODITIES TRADING CORPORATION, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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FIFTH POINT.—Respondents were not allowed "retention value" by the Court of Claims, but less than that part of "retention value" which represented what opinions of experts showed the market would have been if there had been no war and such allowance violates no rule of any of the cases cited by Petitioner 30

SIXTH POINT.—While there was no market in the United States in 1944 prior to October, in which month the price was increased to 10¢, there was an active market in India, the next largest producer of black pepper to Sumatra, and there was no obstacle to importing up to 20,000,000 pounds of this pepper except the refusal of O. P. A. to allow the same. Said Indian market price was 21¢ delivered alongside and sustains an allowance of at least 22¢ a pound as just compensation to plaintiffs 33

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

THE UNITED STATES, *Petitioner,* v. COMMODITIES TRADING CORPORATION, *et al.,* *Respondents.*	No. 156

Brief of Respondents in Opposition to Petition for Writ of Certiorari to Court of Claims.

Respondents, Commodities Trading Corporation, *et al.,* oppose the petition of the Solicitor-General for a Writ of Certiorari to review the judgment of the Court of Claims.

Petitioner, the United States, does not state correctly the question presented. That question is actually two-fold and is:

FIRST: Whether, in a suit for just compensation by the owner of Whole Black Pepper requisitioned by the United States for War uses in May 1944 (which pepper was not perishable [Fdg. 25, R. 22] and could have been easily and cheaply stored and held until the end of price control [Fdgs. 21 and 24, R. 19-20, 21-22]), the O. P. A.'s ceiling price of 6½¢ must be considered as the sole measure of value, regardless of the fact that the O. P. A. Price Regulations themselves afforded many opportunities for selling far above that 6½¢ price in May 1944.

Instances of such opportunities are as follows:

(1) By mixing ground pepper with cheap neutral agents, three parts neutrals to one part of pepper, and selling the whole as imitation or synthetic pepper, which was permitted and for which there was an O. P. A. established ceiling price of 16¢ per pound in 1944, and thereby obtaining 25¢ to 40¢ per pound for the pepper (Fdg. 18, R. 18-19).

(2) By selling to foreign countries, especially South America, at the O. P. A. restricted price, but much higher than the United States ceiling price (export licenses required) (Tr. 9-11, 80-81, 120).

(3) By selling to Porto Rico, Hawaii and Alaska at O. P. A. prices much higher than the continental United States ceiling price (no licenses required) (Fdg. 20, R. 19).

All of the above matters are fully discussed and the Regulations analyzed at pages 7-9 and 14-17, *infra*.

This is just the opposite of the situation in the *Felin* case where the owner had to sell and could not sell above the ceiling price. Here the owner did not have to sell at all but could have sold far above ceiling of 6½¢ if he had wished to sell at such prices.

SECONDLY: Whether said ceiling price would be the proper measure of just compensation, when said ceiling price bore no relation to value at the time of seizure, by reason of all of the following facts and when all holders refused to sell (Fdg. 19, R. 19):

(a) A dearth of pepper throughout the whole world and market price thirty times the O. P. A. ceiling, where no price control (Tr. 17, 95).

(b) Certainty of shortage of pepper and correspondingly high price by 1944, if there had been no War, due to causes which had taken place prior to the War, which still existed at the beginning of the War, and which could not have been remedied in less than approximately seven years, which shortage was increased by but not caused by the war (Fdg. 26, R. 22, Tr. 99-100, 135, 160).

(c) In May 1944, ceiling price had become arbitrary, unreasonable and unrealistic and was maintained against advice of entire spice trade (Fdg. 16, R. 18, Tr. 48-51) and within five months after requisition here in question, O. P. A. was forced to increase price to 10¢, a 50% increase, and later to 16¢, approximately two and one-half times the ceiling price at time of seizure (Fdgs. 19, R. 19).

(d) No market in the United States in May 1944 and no trading for many months prior thereto and subsequent thereto, and none until said increase of 50% (Fdg. 19, R. 19), but active market in British India where 20,000,000 pounds allocated to the United States by Allied Food Board was available for purchase (Fdg. 23, R. 21), market price 21¢ per pound delivered in the United States and O. P. A. Regulations sole obstacle to supplying much needed pepper in United States (Fdg. 23, R. 21).

(e) Ceiling price less than half of average cost of pepper requisitioned, and of all of owners' 17,000,000 pounds (Tr. 123-124).

(f) Continuance of ceiling price in May 1944, which had prevented all dealings for many months (Fdg. 19, R. 19), and when Commodities Trading Corporation held 60% of all Whole Black Pepper in hands of importers (Fdg. 14, R. 18), and when remainder was in hands of a few others was direct

effort of O. P. A. to force sales of this pepper before permitting importation of Indian pepper (Fdg. 23, R. 21, Tr. 55-56).

Petitioner's statement of the question presented further deviates from that actually presented by the record as follows:

The ceiling price "when established" did not approximate "free market value". On the contrary, it was a depressed market price resulting from the dumping on New York of the holdings of war-frightened Sumatrans, plus the unauthorized attacks and restrictions upon the holders and purchasers of pepper by Mr. Leon Henderson, first head of O. P. A. (Tr. 162, 113, 117-118).

Nor did such ceiling price "form the basis for substantial trading". On the contrary, those who sold were the small holders who were scared out of their holdings soon after ceiling prices were established (Fdg. 11, R. 16-17). No trading for many months before and after May 26th, 1944 (Fdg. 19, R. 19).

Nor did the retention value allowed respondents take into account "scarcity value caused by wartime shortages". Had it done so, the allowance to respondents would have had to have been upwards of 50¢ per pound (Fdg. 17, R. 18), instead of the 15¢ allowed by the Court of Claims, and the 22¢ asked in the Complaint.

Nor was an "expectation of an ultimate removal of wartime price restrictions" on May 26th, 1944, a "speculation". It was a practical certainty and highly probable in the near future. By that time the Allies were winning all along the line.

Statement.

Petitioner produced only one witness upon the trial of this case before the Court of Claims and he did not contradict in any way any of the evidence introduced by Respondents (Tr. 146-173).

The Court of Claims made many of its findings along the lines requested by these Respondents, but in some cases watered down the evidence considerably. That Court also made several findings requested by Petitioner herein, which were not supported by any evidence. However, the facts actually found, support the allowance of 15¢ per pound made by the Court of Claims and indeed a substantially greater allowance. This Respondent has petitioned this Court for a Writ of Certiorari to review the failure of the Court below to allow 22¢ per pound. Such petition is No. 163 on the October 1949 term of this Court and states the facts at some length.

Petitioner, picking and choosing its facts, gives a very different picture of the situation from that as seen by these Respondents.

Thus, in an effort to make it appear that there was a plentiful supply of pepper at the beginning of the War and that the ceiling price of 6½¢, which was half of the average over many years and ¼th of the average from 1915 to 1930 (Fdg. 9, R. 16), was a fair one, Petitioner says (p. 4 of Brief):

> "• • • there were about 78,000,000 to 100,000,000 pounds (about three years' supply) of Whole Black Pepper in the hands of importers in the United States (R. 15)."

That statement is supported by the findings, but Petitioner omits to state that said quantity was practically all the pepper that there was in the world at that time (Tr. 17) and was less than one year's supply for the world (Tr. 69).

Again, Petitioner refers to Respondent, Commodities, herein, as a speculator in pepper (p. 13), and says that of the stock pile of 78,000,000 pounds above referred to, approximately 17,000,000 was owned by Commodities (p. 4), giving the impression that Commodities was a War

speculator. This is directly contrary to the fact. Commodities was a corporation which was *sui generis*. It was composed of four friends who set out in 1934 to accumulate a minimum of 15,000,000 pounds of pepper (which substance is not attacked by insects, remains unimpaired for decades, and is easily and cheaply stored), and to hold the same for the next peak of prices, which was bound to come (Tr. 30-37, Fdg. 25, R. 22). This accumulation continued to 1939, when their corporation, Commodities Trading Corporation, had built up an inventory in the United States of upwards of 25,000,000 pounds of whole black pepper (Fdg. 5, R. 14).

When the War clouds appeared, Commodities, instead of buying, sold, to an aggregate of about 8,000,000 pounds, reducing its inventory to 17,000,000 pounds (Fdg. 8, R. 15, Tr. 33).

The Court of Claims found that the pepper seized by the Army, and the subject of this litigation, had been held by Commodities for an average of nine years and four months at the time of seizure (Fdg. 24, R. 21). All of the 17,000,000 pounds had been held for about that time on an average.

At page 7 Petitioner indicates that there was some selling of pepper after September 30th, 1943 at the 6½¢ price. This is not correct, there was none, the Court of Claims found:

> "19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October." * * *
>
> "15. * * * Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders * * *."

The ceiling price in question was one for importers and traders. The grinders sold ground pepper at a higher price (O. P. A. Reg. 52).

As early as October 1943 the army offered to pay Commodities Trading Corporation 9¾¢ for 1,000,000 pounds and later requisitioned (Fdg. 22, R. 20).

Moreover, it was during this period that there was being sold in large quantities imitation or synthetic pepper—only one-fourth real pepper—at O. P. A. ceiling of 16 cents per pound (Fdg. 18, R. 18).

See also testimony of brokers and dealers and head of spice division of O. P. A. that pepper could not be bought (Tr. 47, 90, 91, 156).

Petitioner at pages 7 and 8 refers to a letter of the Price Administrator and states the contents as facts. This letter was shown by Petitioner's own witness, head of O. P. A. spice section, to have been an outrageous attempt to prejudice Commodities Trading Corporation. The Court of Claims refused to find any of the facts stated therein and found that some element of plaintiff's costs aggregated $.127 in the face of the statement in said letter that its cost was only 5.156 cents per pound. For fuller discussion see Point 7, *infra*, on the cost of the pepper.

This letter was released at the time that the government sought unsuccessfully to requisition all of Commodities Trading Company's pepper principally for civilian use.

Respondent does not assign error to the findings of cost by the Court of Claims, and the statements of the letter seem to have no proper place in the statement of facts.

At page 9 Respondent says:

> "Fifty percent of the award was thereafter paid to them (R. 15) and on October 3, 1945 this suit for just compensation was filed with the Court of Claims (R. 1-4)."

This is slightly misleading. No payment whatever was made to Commodities Trading Company until weeks after this suit was brought and eighteen months after the requisition (Fdg. 7, R. 14, 15).

Because of the full discussion of the facts in these Respondents' own petition and because the facts are rather numerous and can be best and most succinctly stated in connection with the particular points to which they apply, respectively, Respondents will merely make a brief statement of the salient facts.

There was a complete change in the situation between December 1941, when pepper dumped in huge quantities by the War frightened Sumatrans upon the New York market (Tr. 162, 113) was selling at 6.75¢ per pound, at which time the O. P. A. fixed a ceiling price at that figure, and the situation in May 1944. At the latter date, the 100,000,000 pounds in the hands of importers in the United States, when War was declared, had been reduced to 28,000,000—less than a year's supply for continental United States (Fdg. 14, R. 18, Fdg. 8, R. 15, Tr. 69).

There was a worldwide shortage of black pepper (Tr. 17). It was selling for as much as $2.00 per pound in countries where there was no ceiling price (Tr. 95, 56). But the O. P. A. had kept the ceiling price at 6½¢ for two years and three months. This, in spite of enforced reductions in use by quotas down to 40% of normal. The ceiling price did not prevent holders of Whole Black Pepper from selling lawfully in May 1944 at much higher prices than 6½¢ (Fdg. 13, R. 17-18).

Instances of this ability to sell at prices higher than ceiling are as follows:

(a) the sale of a concoction called imitation or synthetic pepper, consisting of ¼th pepper and ¾th cheap adulterants, with an O. P. A. ceiling price of 16¢ per pound (Fdg. 18, R. 18-19).

(b) sales to Porto Rico, Hawaii and Alaska (Tr. 154).

(c) sales to South America (Tr. 9-11, 80-81, 120).

In addition all of the following evidence, bearing upon value and just compensation, showed that an allowance in excess of 6½¢ and in excess of 15¢ was required: Market prices, up to $2.00 per pound in South America and other conutries where no ceilings were imposed (Tr. 95, 56); an active market in India at 21¢ per pound, where exports were limited to England, the United States, and other countries approved by them, where up to 20,000,000 pounds could have been purchased delivered in New York for 21¢ freight and insurance paid except for prevention by O. P. A. (Fdg. 23, R. 21); a price of 60¢ as soon as the ceiling was removed; opinion evidence by experts that, had there been no War, the price in May 1944 would have been at least 20¢ due to peculiar conditions which existed in 1942, and which would have taken seven years to remedy, in the absence of War (Fdg. 9, R. 15, Fdg. 26, R. 22-23; Tr. 99 and 100, 65), and many other factors, showing actual value, besides an actual cost of 14.59¢ per pound (Tr. 123-124).

Plaintiff sought no War profits and limited its claim to an amount which it could have obtained, had there been no War.

The opinion of the Court of Claims accepts this Respondent's contentions as to most of the facts and as to the Rules of Law applicable, but the judgment grants only approximately two-thirds of the minimum which should have been allowed upon the theories accepted by the Court of Claims.

The decision was clearly a compromise one and so stated by the Court of Claims.

Petitioner's Specification of Errors.

In the Specification of Errors numbered (4), error is claimed with respect to a *holding* of the Court that was never made or approached in its Findings or Judgment.

The quoted portions of said Specification are taken from two different paragraphs of the *Opinion* not in sequence.

If the Court of Claims had held as stated by Petitioner, the judgment for plaintiff would have had to have been on the basis of 60¢ per pound of pepper requisitioned, instead of the 15¢ which was actually awarded, as Whole Black Pepper was selling at that price immediately after the ceiling was removed (Spec. Fdg. 17, R. 18; Tr. 96-97) rising to 80¢ (Tr. 40) and now to $1.00.

FIRST POINT.

The facts in the case at bar are just the opposite of those which impelled some of the justices of this court to suggest in the Felin case that the ceiling price was the measure of value and of just compensation in that case.

In the *Felin* case (*United States* v. *Felin*, 334 U. S. 624), perishable property, owned by a dealer in that class of property, was requisitioned. The majority of the Court seemed to be against accepting the ceiling price as the measure of value and of just compensation, even in that case. However three of the Justices did make that suggestion.

The basis of their opinion was that, viewed realistically, the *Felin Company* had to sell and that as it could not sell for more than the ceiling price, its said perishable property was worth *to it* no more than that price and it was damaged by the taking no more than that amount.

The emphasis was put directly on the fact that the property was perishable and had to be sold, and that the

dealer would have to continue to sell or go out of business. That is just the exact opposite of the situation here presented.

Respondents' pepper is not perishable, but can be stored for many years without deterioration (Fdg. 25, R. 22). It is not a substance which was essential for the defense of the United States or for the well-being of civilians (Deft.'s Ex. 5 and Stipulation of Facts, Tr. 206-207, 220). It is used in only minute quantities—only ¼ of a pound per person per annum (Tr. 26). There was no freeze order or program price fixed with respect to Whole Black Pepper and the only regulations and restrictions imposed consisted of O. P. A. Reg. 52 which fixed a general ceiling price, first 6½¢, then 10¢ and then 16¢ with certain exceptions (Fdg. 19, R. 19) and the imposition of quotas upon packers and grinders. Those quotas were first 100%, then 90, then 60, then 40 of prewar volume of business (Fdg. 13, R. 17-18).

Not only was there no compulsion, either legal or practical, which required Respondents, or their predecessor, Commodities Trading Corporation, to sell to anyone in May 1944, and it could have held its pepper until the end of Government Regulation, but it did not wish to sell at that time, and it was not faced with "economic hibernation" or "economic extinction" by any means. The situation as to this matter is well explained in the opinion of the Court of Claims, as follows:

> "This so-called 'retention value' is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper; it was rather an investor in pepper. It began buying pepper in 1933, and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it" (R. 25).

Plaintiff, Commodities Trading Company, had no customers. It belonged to no spice associations, but held aloof from spice dealers. Its inventory was never considered as a part of the stocks of pepper for sale (Tr. 217-19).

The fundamental distinction between the case at bar and the case of *United States* v. *Felin*, 334 U. S. 624, is well stated in the opinion of the Court of Claims as follows:

> "Mr. Justice Reed, who wrote the concurring opinion in which the view was taken that the ceiling price was the measure of just compensation, made it plain in his opinion that they were dealing in that case with perishable property. In the following quotation from his opinion we have underscored his use of the word 'perishable':
>
> 'It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their *perishable* property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the *perishable* property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of "just compensation." That lawfully fixed market price deter-

> mines what the *perishable* article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is "just compensation" " (pp. 645-6). (Italics, those of Court of Claims.)

Thus, the whole basis of the suggested effect to be given to the ceiling price in the *Felin* case was the fact that the property requisitioned was perishable and the owner thereof was a dealer in that kind of property, neither of which conditions applied to Commodities Trading Corporation or its property.

The Court of Claims after quoting as above from Mr. Justice Reed's opinion continues:

> "Even if the ceiling price is the measure of just compensation for perishable property, we do not think it can be said to be the measure where nonperishable property is requisitioned. This is so because the owner of nonperishable property has the right to hold it until after restrictions are removed, and then sell it. He is not required to sell at the ceiling price, whereas the owner of perishable property must sell at the ceiling price or let his property perish.
>
> We have several times held that, in determining just compensation, we must take into account the plaintiff's right to hold its property until restrictions on its disposition are removed. *Seven-Up Bottling Co.* v. *United States*, 107 C. Cls. 402; *Kaiser* v. *United States*, 108 C. Cls. 47; *Adler Metal Products Co.* v. *United States*, 108 C. Cls. 102; *Pantex Pressing Machine Co.* v. *United States*, 108 C. Cls. 735" (R. 24 and 25).

SECOND POINT.

The regulations of O. P. A. themselves afforded to plaintiff, Commodities Trading Corporation, many opportunities to sell its pepper at prices far in excess of the 6½¢ general ceiling price. This fact constitutes another direct distinction between the case at bar and the Felin case.

The foundation of the argument set forth in the quotation from the Opinion of Mr. Justice Reed in the *Felin* case was not only that *Felin* had to sell, but that he could not obtain more than the particular ceiling price in question for his perishable property.

In the case at bar, plaintiffs proved numerous opportunities afforded by the O. P. A. Regulations themselves which permitted the owners of Whole Black Pepper to sell at prices far in excess of the said general 6½¢ price. These instances were as follows:

Use of its pepper for the making of synthetic or imitation pepper and the selling of same at an O. P. A. ceiling price to return from 25 to 30¢ a pound for the pepper (Fdg. 18, R. 18-19).

On this point the Court of Claims found:

> "18. During the years 1943 and 1944 which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.
>
> "This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound * * *."

The cost of grinding Whole Black Pepper was only a fraction of a cent per pound (Tr. 156).

This Court can take judicial notice that parched corn, wheat and cotton seed hulls are cheap ingredients. Thus, one thousand pounds of ground pepper mixed with three thousand pounds of these cheap adulterants could be sold in bulk at an O. P. A. ceiling price of $640.00. If only half of this is attributed to Whole Black Pepper, 32¢ would be realized for each pound thereof.

Other instances where the O. P. A. Regulations themselves gave to Commodities Trading Corporation and other dealers in its class, opportunities to sell at prices far in excess of the 6½¢ ceiling price were as follows:

Whole Black Pepper in hands of bulk dealers, in which class was Commodities Trading Corporation (see F. D. O. 19), could be sold in quantities less than one bag (150 lbs.), free from restriction of said ceiling price (see Regulation 52 of O. P. A.)

The said F. D. O. 19 put restrictions and limitations upon sales and established quotas, and plaintiffs understand that the War Food Administration contended that bulk dealers were subject to those restrictions, even though they are applied specifically to packers and grinders and other receivers of pepper.

However, said F. D. O. 19 provides as follows:

> "Any person may, without charge to his quota, deliver or accept for delivery any restricted spice to any of the following persons: * * * the Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, the American National Red Cross or the United Service Organizations, Inc., any person operating an ocean going vessel, any person for retail sale through concession restaurants at the Army, Navy, Marine Corps or Coast Guard Camps and others."

The cost of those sales would have been negligible (see testimony of Government's Witness, Squires, Head of Spice Division of O. P. A., Tr. 156).

A further opportunity to sell for prices far in excess of the said ceiling price was furnished by the Regulations of O. P. A. with respect to sales to Porto Rico, Hawaii and Alaska (Fdg. 20, R. 19). An entirely different method of measuring ceiling price in sales of that kind was provided from sales in Continental United States. The ceiling price was either 10% above the O. P. A. ceiling price in Continental United States, plus 125% of the prewar percentage markup or cost plus a percentage (O. P. A. Price Reg. 52, Tr. 154).

As plaintiff, Commodities, had paid much more than 6½¢ for some of its pepper, and as its mark ups on foreign sales had been substantial, the above rules gave it an opportunity to sell at prices more than double the ceiling price, and plaintiff did in fact sell substantial quantities of pepper to Porto Rico for 14.19¢ per pound (Fdg. 20, R. 19; Tr. 120, 123).

While these sales were made in 1945 and after the ceiling price had been increased to 10¢ per pound, the same opportunity to sell at the same price existed in May 1944, as those sales were made on the basis of cost plus allowance of export profit.

A still further opportunity to plaintiff, Commodities, and others to sell for prices far in excess of said 6½¢ ceiling price was furnished by the O. P. A. Regulations with respect to sales to foreign countries. These were substantially the same as the sales to Porto Rico, Hawaii and Alaska, but in this case the opportunity to sell was not unrestricted as in the case of those sections of the United States, but export licenses were required. However our Good Neighbor Policy required the United States to share its dwindling supply of pepper with South America, and export licenses were issued to many holders of Whole

lack Pepper, including Commodities, which was allowed fill orders from Argentina for 35,000 pounds at the uivalent of 21¢ a pound* (Tr. 120-123).

Thus, it is seen that the whole foundation for the opinn of Mr. Justices Reed, Black and Murphy in the *Felin* se is entirely lacking in the present case, as there were any opportunities for plaintiff, Commodities, to sell far excess of the ceiling price. Therefore the value of its pper to it was much more than 6½¢ and it suffered a ss of much more than 6½¢ through the taking thereof the Army.

THIRD POINT.

There was no market in black pepper in the United tates in May 1944 and none had been sold for many onths prior thereto and none was sold until October of at year and until after the ceiling price had been inreased to 10 cents. These facts distinguish the case at ar from several of the cases cited by petitioner and furher distinguish it from the Felin case.

The Court of Claims found:

> "15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Com-

*The actual price obtained for this pepper was 30.93c to 32.31c per pound r white pepper, but black pepper may be transformed into white pepper by e removal of the outer shell and at a total cost, including such loss, of 1/3 Tr. 120-121).

modities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions" (R. 18).

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October" (R. 19).

The Solicitor-General, at page 7 of his brief says:

"Between September 30, 1943 and the date of requisition, May 26, 1944, very little Whole Black Pepper was sold out of these inventories (R. 18) (the 28,000,000 lbs. still in the hands of importers on September 30, 1943) and Commodities itself apparently refused to sell any substantial amount either to the Government or to private purchasers."

This is no contradiction of plaintiff's proof, that there was no market whatever and no sales during any part of 1944 prior to October (Fdg. 19, R. 19).

However, the statement itself has no support. There was no proof that Commodities itself had sold a pound subsequent to September 30, 1943 and the proof is that it did not and could not have sold any substantial amount from the beginning of the War to May 26, 1944. It started with an inventory of approximately 17,000,000 pounds at the beginning of the War (Fdg. 8, R. 15). The Army requisitioned a million pounds in December 1943, and Commodities had on hand at the time of the requisition here in question on May 26, 1944, 16,153,000 pounds (Tr. 122).

Moreover, early in October 1943, the Army offered to purchase said million pounds from Commodities for 9¾

cents. In March 1944, the Government sought to requisition practically all of the pepper of Commodities and other importers (Tr. 206-208). The only justification for either of the above actions was an inability to purchase at the ceiling price.

Moreover, when plaintiff, Commodities, brought an injunction suit to prevent said requisitioning of its pepper, the Department of Agriculture, through its officials Long and Olmstead, put in affidavits showing the absolute impossibility of purchasing any pepper for many months prior to March 1943 for either Army or civilian use, and went into this matter in considerable detail. These affidavits were offered by plaintiffs and excluded by the Commissioner, but were marked for identification and form part of Section "K" of the Stipulation of Facts, and appear at pages 208 to 214 of the Transcript.

Two of the largest dealers in pepper in the United States testified flatly that there was absolutely no market and no sales (Tr. 47, 90 and 91).

Indeed, the scarcity of pepper was so great that, as above shown in the Second Point, the concoction called imitation or synthetic pepper, which contained only one-fourth or less actual pepper, was sold in large quantities at high prices with O. P. A. assistance. With respect to this matter, the Court of Claims found as above shown:

> "18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remiander being ground parched corn, wheat, cotton seed hulls, or other neutral agents.
>
> "This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on

whole black pepper was 6.5 cents a pound" (R. 18-19).

No one would have bought this stuff if there was any real pepper obtainable at 6½¢.

At page 14 of its brief, the Solicitor General refers to the maximum price of 6½¢ cents as one validly established in time of War and forming the basis for substantial trading.

Respondents submit that this statement is not justified, as shown conclusively previously in this point. There was no substantial trading, nor any trading of any kind for many months prior to the requisition in question. The trading that did take place occurred shortly after the establishment of the ceiling price, and was due largely to sales by small holders discouraged by the ceiling price (Fdg. 11; R. 16), and perhaps by the hostile attitude which Mr. Leon Henderson had taken toward them (Tr. 164, 165). The Court of Claims further found that "upon the establishment of price ceilings, the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942, as importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impracticable because of War conditions" (Fdg. 15; R. 18). The middle of 1942 was only approximately three months from the time when the ceiling price of 6½¢ was first put into effect, and only about five months from the initial fixation of a ceiling price.

The fact that there might have been and were heavy sales in 1942 has importance only as showing a market at the ceiling price, but proof of a market in 1942 is no proof of a market in May 1944, especially in the face of the direct testimony that there had been no sales in 1944 prior to October, and that all selling had dried up long previous to 1944.

Respondents have stressed, and perhaps over-stressed, this point, but their excuse is that in most of the cases where a ceiling or program price has been held the measure of just compensation, the Court found that such ceiling or program price was the market price, and that there were substantial sales currently.

It would be hard to imagine a case where the proof of no market and no sales could be stronger than the case at bar.

This situation is in strong contrast to that which existed in *Felin* v. *United States,* 334 U. S. 624; *Cudahy Bros. Co.* v. *United States,* 155 F. (2) 905; *Vogelstein & Co.* v. *U. S.,* 262 U. S. 337; *Louisville Flying Service, Inc.* v. *U. S.,* 64 F. Supp. 938; *Lessner Plumbing and Heating Co.* v. *U. S.,* 64 F. Supp. 931 and *Graves* v. *U. S.,* 62 Fed. Supp. 231, cited by petitioner.

In all of the above cases, there was clear proof that there was a market and actual selling. Thus, in the *Felin* case, the prevailing opinion states (p. 638):

> "• • • throughout the period in controversy it (respondent Felin & Co.), continued to buy live hogs at prevailing prices and to sell pork products derived from them at the authorized ceiling prices, even when this meant selling its pork products below the price that the Court of Claims found to be their replacement cost value."

The Court supported that statement with a footnote setting out a finding of the Court of Claims as follows:

> "Throughout the period mentioned (prior to and after the March 1943 requisition) plaintiff continued to buy live hogs at prevailing prices and to sell pork products derived from them at the ceiling prices authorized by Regulations of the Office of Price Ad-

ministration, even when the cost of live hogs was greater than the wholesale prices of the products obtained from them" (67 Fed. Supp. 1022) (p. 638, Note 13).

Thus, it appears that for reasons of its own the plaintiff was, at the time of the requisition or thereabouts, making sales of similar property to that requisitioned at ceiling prices. Therefore, regardless of plaintiff's motives in making such sales, there was a market at the ceiling price, which fact alone completely differentiates the *Felin* case from the case at bar.

In the *Vogelstein* case (262 U. S. 337) it was held that just compensation for copper taken by the Government during the First World War is to be measured by the market value of the copper at the time of the taking and not by higher prices which the owner was obliged to pay under long time purchase contracts.

The case is not in point for the reason that the facts showed that there *was a market price* for the copper at the time of the taking, which price was paid by the Government.

This Court found that the contention of the appellant that there was no market price other than that fixed by the *fiat* of the United States was without support, saying of the market price found by the court below:

"The price so found uniformly prevailed during the period in question" (p. 340).

The case is therefore not in point.

In the *Cudahy* case (155 F. [2] 905), another meat case, the Court found that at the time of the taking of the carcasses there was an established market at Cudahy, Wisconsin, at which the owner was selling like carcasses at the ceiling price. That fact alone, of course, completely differentiates the case from the case at bar.

In the *Lessner* case (64 F. Supp. 931), copper and copper base alloy products were requisitioned. These were brass pipes used by owner in making installations of plumbing in houses. There was no market or possible use for the products as brass piping because of governmental use restrictions. However, the copper recovery program set forth prices at which idle and excess inventories of copper and copper alloy materials might be sold.

The Court found:

> "The market value of plaintiff's holdings at the price established under the Copper Recovery Program was $262.21." (p. 934)

and gave judgment on that basis.

Under Maximum Price Regulation No. 12 of O. P. A., the ceiling price would have restricted plaintiff to about one-half of the above recovery.

In support of the above quoted finding, the District Court found that:

> "Plaintiff's holdings of brass pipe consisted of eight different sizes and chemical compositions. In some cases it held only one twelve foot length of a given size of pipe and its total inventory gave the appearance of being remainders left over from various installations which it had made. In no case did plaintiff hold enough of any single size and composition of pipe to enable it to be used for a complete job" (Fdg. No. 21).
>
> "The permitted users of copper base alloy products were only interested in buying substantial quantities and did not consider plaintiff's holding a marketable quantity" (Fdg. No. 22).
>
> "Almost 15,000 holders of idle and excess inventories of copper and copper base alloy products

sold their holdings voluntarily to Copper Recovery Corporation (a government agency) at the prices established under the Copper Recovery Program. The aggregate weight of these holdings exceeded 105,000,000 tons" (Fdg. No. 23).

"Over 13,000,000 pounds of copper and copper base alloy piping and tubing were sold voluntarily to Copper Recovery Corporation at the prices established under the Copper Recovery Program" (Fdg. No. 24).

The amount involved in the entire controversy was only a few hundred dollars. The material consisted of odds and ends and the facts above recited seem to establish that there was a market price as found by the Court.

Of course, it is well established that where there is a market price that is all that an owner can recover for property requisitioned.

Graves v. *United States*, 62 Fed. Supp. 231, was another District Court case dealing with the Copper Recovery Program.

The property requisitioned was certain metal handles for blow torches. Because of the scarcity of copper, the Government prohibited the making of such material or the sale of it. The property was saleable during the War only as scrap.

There was no proof introduced to show that the property would have a use or value after the War or what that use or value might be. This case, like the *Lessner* case, involved only a small amount of money and apparently no attempt was made to assert the principle of "retention value".

There was an O. P. A. ceiling price of 10¼¢ per pound for copper base alloy scrap, whereas under the Copper Recovery Program, the Government offered 19.93¢ per pound.

Many persons, as shown more fully in the *Lessner* case, availed themselves of this opportunity to sell to the Government for nearly twice the O. P. A. ceiling price.

The Court found (Fdg. 13):

> "The fair market value of the requisitioned castings on the date of the taking was the Copper Recovery Program price of 19.93 cents per pound."

and judgment for that amount was given. There were sufficient facts from which the Court might reasonably have found market price at the figure stated. Having found market value as above stated, the Court properly found that plaintiffs were entitled to recover no more than such market value.

In *Louisville Flying Service, Inc.* v. *United States* (*supra*), the District Court allowed what was manifestly a most fair amount for the plaintiff's airplanes. The amount involved was relatively small and no appeal was taken. There was clearly a market price, which price was allowed the plaintiffs.

Five thousand four hundred and thirty-four planes were acquired by the Government from private owners shortly after the outbreak of War. These planes were all acquired according to a formula which started with the list price of the plane on October 1, 1941 and depreciated it according to certain rules. Of all the planes acquired, the two planes of plaintiff were the only ones where the Government formula price was rejected. Even plaintiff accepted the formula as fair and it appeared that it declined to sell voluntarily only because of tax reasons.

Moreover, nineteen planes of the same model as the two planes of the *Louisville Flying Service* were acquired at the same program price by voluntary transfer. On the above facts, the Court held that there was a market price and said:

> "But, if there is an existing established market value, even though the owner declines to sell at it, it becomes a yardstick in determining what the Government must pay if it decides to take the property through condemnation proceedings" (p. 942).

Doubtless the planes in question, due to the War emergency, could have been sold for much more than the Government Program Price, if the Government had not prohibited the sale of any such planes during the War emergency. On the other hand the proof clearly indicates that plaintiffs received as much and more than they could possibly have shown as "retention value", though no claim therefor was made.

FOURTH POINT.

Plaintiff, Commodities, could reasonably have realized in May 1944 far more than 6½¢ for its pepper, if no war had intervened, and plaintiff lost much more than 6½¢ per pound by the taking of its pepper. To restrict just compensation to 6½¢ in such circumstances would be a travesty upon justice.

In the prevailing opinion in the *Felin* case, *supra,* this Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction" (p. 641).

and further

> "In enforcing this Constitutional requirement, (the just compensation required by the Fifth Amendment), the question is 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *McGovern*

> v. *New York*, 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken" (p. 630).

The above is precisely what these respondents claim. Respondents' predecessor, Commodities Trading Company lost 759,750 pounds of its inventory of Whole Black Pepper (Fdg 3, R. 13). What must respondents be paid to put them in as good a position pecuniarily as they would have been in if the property had not been taken?

Whether respondents are entitled to the higher prices due to the permanent destruction of pepper plantations by neglect or by the Japanese after the invasion of Sumatra may be debatable, but that would require an allowance of from 50¢ to a dollar a pound. Respondents are claiming only 22¢ per pound, which is no more than the pepper requisitioned would have been worth in May 1944, had there been no War.

The graph found by the Court of Claims in its ninth finding shows that for 75 years the price of pepper moved in cycles and that those cycles were fairly regular in that the length of time between the several tops and the several bottoms was always about 15 years—the life of the pepper plant (Findings 9 and 26, R. 16, 22-23). The evidence showed that pepper prices had moved in these cycles for over 100 years (Tr. 37).

The reason for the cycles was shown in Finding 26 as follows:

> "The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines.

"The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942.

"If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (Fdg. 26, R. 22, 23).

The proof was much stronger than the findings and respondents, in their petition for certiorari, have assigned as errors the failure of the Court to find in accordance with the evidence (Assignment of errors 17 to 18).

The statement in the finding above, that it was probable that production of pepper in Sumatra would have decreased each year after 1941 until about 1945 or 1946 is a great understatement. Humanly speaking, it was inevitable. The pepper vine does not produce at all until four years after planting and does not get into real production until seven years thereafter (Tr. 160). It continues to bear only seven years (Tr. 134, 135). So in 1941 all of the pepper vines which had been planted 14 or 15 years previously were dying of natural causes, and each year vines which had been planted in later years would die (Tr. 135). Continued new plantings were always required to maintain a supply of pepper (Tr. 135, 136). There were no new plantings up to the time of the

Japanese occupation, going back as far as 1935 or 1936 (Tr. 140, 143-145). In addition, many pepper gardens had been neglected and had been swallowed by the jungle, a matter which can take place in the space of only a "couple of months" (Tr. 134). This production was gone.

Assuming new plantings in 1942, which the Court seems to do, but without foundation, a trickle from these plantings of pepper would begin to come in 1946 and increase thereafter, but not a pound of pepper would be produced in 1944, or in any year prior thereto, except from vines which had been in the ground for at least four years. On the other hand, most of the pepper vines which had been planted prior to 1930 and all of the heavy plantings of 1927, 1928 and 1929 would have ceased to bear (Fdg. 26, R. 22; Tr. 160, 134, 135).

The above is not a theory or a probability, but is a fact as definite as the multiplication table.

For a hundred years a falling off in production has always been attended by an increase in price (see graph, part of Fdg. No. 9), and the Court of Claims specifically found that such "decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (Fdg. 26, R. 23).

In the petition of these Respondents, No. 163, October Term, 1949, of this Court, they show that the increase in prices due to the decreased supply would have brought about a price substantially higher than the 15¢ allowed by the Court and substantially equal to the 22¢ demanded in the Complaint.

Respondents at this point, however, do not consider it necessary or proper to go into a detailed discussion of the exact increase in price over the market price of 6¾¢ per pound, which existed at the beginning of the War, as they submit that proof of any increase over that price is sufficient to destroy the argument of the Solicitor-General.

FIFTH POINT.

Respondents were not allowed "retention value" by the Court of Claims, but less than that part of "retention value" which represented what opinions of experts showed the market would have been if there had been no war and such allowance violates no rule of any of the cases cited by Petitioner.

The allowance to plaintiff was no more, and, indeed, less than the amount which it showed it could have received in May 1944 for its pepper, based solely on conditions which existed before the War and independently of War, or of approaching War, and which continued until the Japanese invasion of Sumatra in 1942, and which colud not have been corrected until seven years thereafter.

This case presents a most unusual situation and nothing like it could exist, except with respect to pepper or some commodity which took many years to produce. But the facts as shown in the preceding point are plain, and an allowance of the reasonable amount which plaintiff would have obtained, had there been no War, violates no principle of any case cited by the Petitioner.

Petitioner, at page 15 of his brief, concedes that the payment to respondents must be just and equitable and the many cases cited by him at that page do hold that a just and equitable payment is all that the Fifth Amendment prescribes, but it does prescribe that payment.

Is it just to pay respondents half of the cost of their pepper and less than one-third of what their pepper would have been worth, had there been no War, and less than one-tenth of what it could have sold its pepper for during the War if not restricted by Government controls because of a ceiling price which put a stop to all trading?

A ceiling price is fixed to prevent the holders of property taking advantage of War scarcities. There is no attempt at anything of that kind here.

At page 16 of its brief, the petitioner states that it is anomalous to require the Government to pay a higher price as just compensation tha nthe price at which property is sold to the general public, but that is not this situation. No pepper was being sold to the public at the price which the Government offered to pay.

The "bugbear" which petitioner suggests at page 17 of its brief, could never arise from any rule asked for by these respondents. No owner would ever refuse to sell at a ceiling price that was anywhere near fair and undergo the great expense of litigation if in the end all he could receive would be the value of his property at the time of taking based upon what it would have been worth had there been no War.

The numerous cases cited by petitioner at pages 17, 18 and 19 of its brief are so far from the facts of the case at bar that comparison is of little value. Those cases do, however, state in general terms the principles for which these respondents contend.

Thus, in *United States* v. *Petty Motor Company*, 327 U. S. 372, the Court said:

> "The Constitution and the Statutes do not define the meaning of 'just compensation', but it has come to be recognized that 'just compensation' is the value of the interest taken."

In *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, the Court said that

> "it was the owner's loss not the taker's gain which was the measure of compensation."

In *United States* v. *Miller*, 317 U. S. 369, the Court held that

> "Fair and substantial justice to the owner is the only basic measure of compensation prescribed by the Constitution."

It excluded from "just compensation" an increase in the value of real estate which had taken place since the authorization of the project for which the property had been taken.

The equivalent of this would take from these respondents the value caused by destruction and scarcity resulting from the War, but would leave to them the full value which would have obtained in 1944 from the failure to plant and the abandonment of pepper gardens which took place prior to the War.

The Court below did not compound any error and did not allow Respondents to get for their pepper whatever anyone is willing to pay at the end of the War, as stated by Petitioner (p. 21 of its brief). That would have required the allowance of a price of from 60 cents to a dollar.

Respondents cannot be classed as "recalcitrant owners" who wished to take advantage of wartime conditions, nor do they ask to be compensated for expected postwar profits, as stated by Petitioner (p. 22). What they do ask is that they be not deprived by the War of the profits that they would have obtained otherwise.

The sales made to Porto Rico subsequent to the requisitioning, which are objected to by the Petitioner, were used by the Court of Claims to reduce the allowance which it made to Respondents.

SIXTH POINT.

While there was no market in the United States in 1944 prior to October, in which month the price was increased to 10¢, there was an active market in India, the next largest producer of black pepper to Sumatra, and there was no obstacle to importing up to 20,000,000 pounds of this pepper except the refusal of O. P. A. to allow the same. Said Indian market price was 21¢ delivered alongside and sustains an allowance of at least 22¢ a pound as just compensation to plaintiffs.

In respondents' Third Point it was shown that there was no market in black pepper in the United States in 1944, prior to October. But the Court of Claims found with respect to the Indian market as follows:

> "23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.
>
> "Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April ..18.55 to	19.00	September	16.90
May	20.00	October	19.76
June	20.99		

> "These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper" (R. 21).

There is no difference in value between Indian pepper and plaintiffs' pepper (Tr. 3-4).

There was a free market in India in that there was no ceiling and the Indians could trade with each other freely (Tr. 12, 21, 61-2). There was a depressed market, however, because the British Government had put restrictions upon the exportation of pepper from India (Tr. 12, 13, 61, 81). Otherwise, the price would not have been 21¢ and the price in South America $2.00.

India produces approximately 30,000,000 pounds per annum and the market price in such a country is certainly strong evidence of value.

SEVENTH POINT.

Cost, plus reasonable profit, justifies and requires an allowance in excess of 20 cents per pound.

In the very recent decision of this Court in *United States* v. *Cors*, 337 U. S. 325, this Court seems to view with favor the acceptance of cost as an important element in determining just compensation.

Respondents' cost, with some important overheads omitted, came to 14.49 cents per pound (Tr. 123-124).

The Court of Claims found the cost of plaintiff's pepper to be 12.7¢ (Fdg. 24, R. 21-22). But in making said finding the Court stated therein as follows:

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the perio dthat pepper was purchased and held. No interest is computed upon cost of any of the carrying charges, but only upon Commodities' original cost."

Moreover, the Court of Claims in said finding allowed for "bank interest, commissions, cables, exchange, etc.," only 2.75% pe rannum.

The interest allowed was not normal of which this Court can take judicial notice. The interest found by the Court was based on the interest actually paid by Commodities which at one time was only ⅛ of 1% per month (Tr. 175-180). But this was explained by a vice-president of the lending bank who showed that the bank had as collateral for its loans to Commodities, the guarantees of several persons of great wealth, stocks and bonds dealt in on the New York Stock Exchange for many hundreds of thousands of dollars and the pepper itself (Tr. 177-178). It was the safest possible kind of loan.

Moreover, the directors of Commodities kept balances with the bank of over $500,000. The bank was in effect loaning them their own money. And without risk. No wonder it was willing to do so at ⅛ of 1% at one time (Tr. 178-179).

Both figures, 14.49¢ per pound, and 12.7¢ per pound constituted costs which had been obtained only through gratuitous service sand advantages furnished by the four friends who owned the company.

The Court of Claims in the *Cors* case considered favorably the inclusion in cost of the value of services rendered gratuitously by an owner and this Court apparently approved.

The addition of the value of gratuitous services and proper overhead would bring the cost figure up to ap-

proximately 17½ cents. Then if a reasonable profit for holding and managing the pepper for 9 years is added, the total should not be less than 21¢ or 22¢. So also if the 12.7¢ figure found by the Court of Claims is built up by including interest at a reasonable rate and applying it to *all* of plaintiffs' expenditures in connection with storing and holding its pepper, the cost found by the Court of Claims would be brought up to 16½ to 17 cents per pound even without important overheads. And if a profit were added for carrying the pepper for nine years, the total would exceed 20¢.

CONCLUSION.

The Petition Should Be Denied.

New York, New York, September 23, 1949.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, ET AL.,
Plaintiffs-Petitioners,

vs.

THE UNITED STATES,
Defendant-Respondent

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWARD L. BLACKMAN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, ET AL.,
Plaintiffs-Petitioners,

vs.

THE UNITED STATES,
Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petition of Commodities Trading Corporation, Irving Trust Company, and other petitioners herein, respectfully shows to this Honorable Court:

A. Summary Statement of the Matter Involved

This proceeding is a suit by the plaintiffs-petitioners, Commodities Trading Corporation and Irving Trust Company against the United States to recover just compensation for 759,750.88 pounds of Whole Black Pepper requisitioned by the United States from the Commodities Trading Corporation on or about May 26th, 1944 (R. 7-10). The

plaintiff-petitioner, Commodities Trading Corporation, hereinafter called "Commodities", owned the said pepper, and the plaintiff-petitioner, Irving Trust Company, had a lien on said pepper for bank loans made by it to Commodities on the security of said pepper (Spec. Fndgs. Nos. 4 and 5, R. 13-14).

The other plaintiffs-petitioners are stockholders of Commodities, who received fractional parts of the claim sued on herein upon the dissolution of Commodities on or about January 22nd, 1946 (Spec. Fdg. 1, R. 12-18).

These individual stockholders intervened as parties plaintiff in March 1948 (Spec. Fdgs. Nos. 1 and 2, R. 13).

On May 26th, 1944, the United States War Department requisitioned the pepper pursuant to the Act of October 16th, 1941 (55 Stat. 742), as amended, and tendered the plaintiffs-petitioners $50,266.76 as just compensation, the said amount being based on the ceiling price for such pepper in effect at the time of the taking and established by Maximum Price Regulation No. 52 (Spec. Fdgs. 3, 4, 6-8, R. 13, 14 & 15).

The two said plaintiffs-petitioners declined to accept the said determination of just compensation, claiming that the pepper requistioned was, on the date of the taking, worth at least $190,000 (Spec. Fdgs. Nos. 3, 6 and 7, R. 3, 14, 15).

The Army proceeded to seize plaintiffs-petitioners' pepper without making the payment provided for by 55 Stat. 742. Plaintiffs-petitioners therefore brought this suit for $190,000 and interest on the 2nd day of October, 1945. On the 27th day of November, 1945, two months after suit was brought and eighteen months after seizure, one-half of the award offered by the War Department, with 4% interest, or $26,404.41, was paid to the said plaintiffs-petitioners. The said $190,000 and interest, less the sum of $26,404.41,

with interest, as above stated, is the subject matter of this suit (Spec. Fdgs. 6 and 7, 28, R. 14, and Complaint).

Plaintiffs-petitioners claim and claimed below that the loss which they suffered through the taking of their pepper is the measure of their just compensation for the taking thereof (Spec. Fdg. No. 6, R. 14), and that such loss could not have been less than:

(a) the market price in India in May 1944 of 21¢ for Whole Black Pepper delivered in New York, insurance and freight paid (Spec. Fdg. No. 23, R. 21, Tr. 14); or

(b) the price which, in May 1944, it was reasonable to expect could be obtained for Whole Black Pepper at the end of the War, less carrying charges to that time, pepper being non-perishable and easily stored (Spec. Fdg. No. 25, R. 22), a price far in excess of 21¢ (Spec. Fdg. No. 17, R. 18 and Tr. 7, 8, 123).

(c) the price which plaintiffs-petitioners could actually have obtained for the pepper at the time of decontrol, less carrying charges from May 1944 to that date—more than 50¢ per pound (Spec. Fdg. No. 17, R. 18); or

(d) the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, had there been no War, a price in excess of 20¢ (Tr. 7, 8, 14, 15, 27, 28, 35, 36, 37, 56, 64, 65, 66, 67, 68, 69, 71, 73, 99, 100, 102, 110, 111, 112, 135, 136, 138, 140, 141-144; Spec. Fdgs. 9, 15-16).

(e) the replacement cost—more than 50¢ per pound (Spec. Fdg. No. 17, R. 18, Tr. 96, 41-2); or

(f) the net price for its pepper which could have been obtained in May 1944 through the use of said Whole Black Pepper in producing synthetic or imitation pepper and the sale of said imitation pepper at the ceiling price established therefor by the Office of Price Administration, a price in excess of 30¢ (Spec. Fdg. No. 18, R. 18-19); or

(g) plaintiffs-petitioners' cost plus a reasonable profit for holding the pepper for an average period of eight years, 20¢ plus (Spec. Fdg. No. 24, R. 21-22).

The Court of Claims found that the value of the pepper was 15¢ a pound (Spec. Fdg. No. 27, p. 23), or about 7¢ a pound less than the lowest value which could have been found on any one of the above bases. The Complaint asks for compensation at the rate of only 22¢ per pound. So the fact that some of the bases would support a much higher price is immaterial.

As to (a) above:

British India was the only market in the world where pepper could have been purchased in quantity in May 1944 (Tr. 60, 61). There was no ceiling price in India, it produced normally upwards of 30,000,000 pounds per year and it was shipping pepper to many of the countries of the world in 1943 and 1944, but subject to the restrictions of the Allied Food Board, which allocated to various countries the amounts which could be shipped from British India (Tr. 12-14, 43, 44, 55, 60-2).

There was a regular market in India in May 1944, and for many months prior and subsequent thereto, and the May 26th market price, freight and insurance paid, delivered in New York, was 21 cents per pound (Spec. Fdg. No. 23, R. 21, Tr. 14).

The Court of Claims found:

"23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the

United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		*Cents*
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper."

(Spec. Fdg. No. 23, R. 21)

No part of the pepper allocated to the United States was imported prior to 1945, despite the great demand for pepper in the United States.

Plaintiffs-petitioners contended that this Indian market price, which was fair and only 50% in excess of the average pre-war price for many years, and slightly below the ceiling price established by the British Government in England when that Government controlled the entire production of new pepper, constitutes a fair measure for determining market value and just compensation for plaintiffs-petitioners' pepper. Such action would not in any way be making a fetish of market price, but would merely adopt a definite fair and logical basis for determining just compensation.

While, of course, the Indian price was influenced by the fact that there was a War, no bullish element affecting market price, which was criticized in the *Cors* case, was present in the Indian market, and the price was held down

to a level considered fair by the British Government through the restriction of exports.

As to (b) above:

In May 1944, there was a worldwide shortage of pepper. This resulted from two main causes.

(1) the cessation of planting pepper vines for several years prior to the War due to the abnormally low price, coupled with the fact that pepper vines do not bear at all during the first four years after planting and do not reach normal production until seven years, and then have a limited over-all bearing life of approximately eleven years. (Spec. Fdg. No. 26, R. 22-23). This would have brought about a scarcity and high prices had there been no War, as is discussed in (d) following; and

(2) the Japanese occupation of all producing pepper areas except British India and the destruction and cessation of planting caused by them (Tr. 17, 60).

With pepper selling at $1.00 per pound and more in countries where prices were unrestricted (Tr. 22-23), and with the constant shrinking in the small available supply, it was certain in May, 1944 that a great scarcity and high price would obtain at the end of the War.

Plaintiffs-petitioners' pepper was non-perishable and would last unimpaired in value for many years (Spec. Fdg. 25, R. 22). It was easily stored and plaintiffs-petitioners could have retained possession of their pepper until the end of the War and until the decontrol of the commodity, and could then have sold at the high prices which did obtain and which were certain to have existed. (Tr. 7-8).

On this matter, the Court below states the general equities of the situation and the special equity of plaintiffs-petitioners as follows (R. 40-41):

"Plaintiff, Commodities Trading Corporation, was not a trader in pepper; it was rather an investor in

pepper. It began buying pepper in 1933 and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it. (Tr. 31-35).

"Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition. As it turned out, the price of pepper shot up to more than 40 cents immediately after restrictions had been removed, and it went on up to 75 and 80 cents (Spec. Fdg. No. 24, R. 21-22; Spec. Fdg. No. 17, 18, R. 18, 19).

"A very great increase in price was inevitable upon the removal of restrictions. The price of pepper had greatly declined beginning in 1935 and 1936, and was still down when the ceiling price was fixed (Chart in Spec. Fdg. No. 9, R. 15-16). This resulted in but little planting and in the neglect of the growing vines, which resulted, in turn, in a scarcity (Tr. 143-4). In addition to this, the Japanese invasion of Indo-China and Sumatra further reduced the supply (Tr. 17). These factors made it inevitable that there would be a very great increase in the price after restrictions were removed. Had plaintiff's pepper not been requisitioned there was no doubt they could have continued to hold it and could have gotten for it a price far in excess of the ceiling price fixed by the Office of Price Administration."

Upon the basis of the above, the Court of Claims stated in its opinion:

"This so-called 'retention value' is particularly applicable in this case."

As retention value is based upon post-war market price, there cannot possibly be present any of the factors having a bullish effect upon prices which the majority opinion of the Court indicated in the *Cors* case should be excluded in determining just compensation.

As to (c) above:

This basis is supported by the facts and discussions in (b) above, plus proof that the market in New York actually was 50¢ plus as soon as governmental restrictions on prices were removed. (Tr. 96).

As to (d) above:

The pepper vine is grown in the jungle. There is a continuous fight against the jungle to preserve the gardens from being swallowed up. The price of pepper reached an unprecedented high for modern times, at 41 cents per pound in 1927 and 1928. This induced great plantings by the natives, who are the producers of this commodity.

Owing to the characteristics of the pepper vine, however, which does not begin to bear until four years after planting, and does not reach normal production until seven years after planting, as immediately above stated, there was an abnormal production, beginning about 1934. This abnormal production brought abnormally low prices and pepper fell by 1938 to 3 cents plus a pound, an unprecedented low, and far below its cost of production. But by 1936 the natives had ceased to plant new vines and had allowed the jungle to overrun and reclaim many of the gardens. By 1940 production had dropped 40%. These facts insured a scarcity of pepper by 1943 or 1944, as pepper vines do not continue to bear indefinitely, but cease to bear when the plant is about fourteen years of age. Hence, the vines that were planted as a result of the burst of enthusiasm over the high prices of 1927 and 1928 were already ceasing to bear by 1941, and the vines which had been planted prior

to 1927 had already gone out of production. As there were no new vines planted in 1937, 1938, 1939, 1940 or 1941, there could be no large production until after 1944. (Spec. Fdg. No. 26, R. 22-23, and Chart in Spec. Fdg. No. 9, R. 15-16).

The situation above described is shown in Special Findings 9 and 26, but the facts shown by the Record are far stronger (Tr. 14-15; 65-68; 138-145).

The pepper market is most sensitive to shortages, and by 1944 there would have been high prices, much higher than the average over seventy years, of 13½ cents.

The opinion states:

> "There is set forth in finding 9 a graph showing the rise and fall in the price of pepper over a period of about 75 years. This shows a marked fluctuation in the price of it in fairly regular cycles. There is a good reason for this. Practically the entire supply of pepper comes from Sumatra, French Indo-China, and India. The pepper vine grows in the jungle. Before planting, the jungle must be cleared and it must be kept cleared. When prices are high the natives plant pepper; but when prices decline, they neglect their vines and allow them to be destroyed by the encroachment of the jungle. The resulting scarcity causes the market to rise. Prices stay high for several years because it takes about 4 years for a pepper vine to bear." (R. 25-26).

As to (e) above:

Commodities had no opportunity to replace its pepper until decontrol, when the price immediately shot up to 50¢ per pound and more (Tr. 96).

As to (f) above:

It was shown that Commodities had an outlet for its pepper in quantity at an O.P.A. ceiling price which equals approximately 4 cents per *ounce*, by mixing with three times the quantity of cheap adulterants or dilutants, such

as parched wheat, cottonseed hulls, etc. and selling the concoction for 16 cents per pound (Spec. Fdg. No. 18, R. 18-19).

As to (g) above, the Court found a *partial* cost for Commodities' pepper at 12.7¢ per pound, but stated that while it had included interest on the cost of *pepper* purchased and held for an average of nine years, it had allowed nothing for interest on the cost of storing the pepper for such average years or on other expenses, and showed that other overhead expenses had been omitted. (Spec. Fdg. No. 24, R. 21-22).

However, the Court stated in said finding:

> "The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs."

In its tabulation on page 36, the Court allows for "Bank interest, commissions, cables, exchange, etc." 2.75% per annum (Spec. Fdg. 24, R. 21-22). This was an entirely inadequate allowance as was shown by the evidence.

The true cost of the pepper taken was 14.59 cents per pound and the average cost of all the pepper h 'd by Commodities at that time—over 16,000,000 pounds—was also 14.59 c nts per pound (Tr. 123-4).

Moreover, if cost is to be used as a basis for determining just compensation, a reasonable profit should be added. The letter by the Chief of the O. P. A., Defendant's Exh. 3, states that the customary profit on pepper is ½ cent per pound, but this applies to sales in the usual course of business, where pepper is bought one month and sold, perhaps, the next. However, where it has been held for eight years, that ½ cent should be multiplied many times. Allow-

ing for the omitted costs and overheads and for a reasonable profit, the figure comes to more than 20 cents per pound.

The above questions were raised in briefs and argument made before the Court of Claims and the judgment of that Court could not have been rendered without deciding those questions.

B. Specification of Errors

The Court of Claims erred:

1. In failing to find that the fair value of 759,750.88 pounds of Whole Black Pepper, the subject of this action, was on May 26, 1944, the sum of $188,500 or 22 cents a pound and in finding instead that said fair value was $113,962.63 or 15¢ per pound.

2. In failing to find that the just compensation to which plaintiffs are entitled for said property requisitioned and payment by the United States therefor is 22¢ per pound, or a total of $188,500, together with interest at 4 per cent, (4%) per annum from May 26, 1944, as an element of just compensation, less the sum of $26,404.14 paid on November 27th, 1945, with interest thereon from the date of payment, and in finding or concluding instead:

> "• • • that the Commodities Trading Corporation, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) plus compensation for delay in payment computed at (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen

cents ($26,404.14) and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid." (R. 23).

3. In failing to find that the market price of Whole Black Pepper in British India on May 26, 1944, 21¢ per pound, delivered in New York, with freight and insurance paid, constituted a minimum measure of plaintiffs-petitioners' just compensation for the 759,750 pounds of Whole Black Pepper requisitioned by the United States Army from plaintiff, Commodities Trading Corporation, on the 26th day of May, 1944.

4. In failing to find that the "retention value" of plaintiffs-petitioners' said pepper, that is, the difference between the prices which it was reasonable to estimate on the 26th day of May, 1944, would exist at the end of the War and upon decontrol of pepper from Government fixed prices, less the estimated carrying charges from May 26th, 1944 to the expected end of the War and of decontrol, is a proper measure for determining the just compensation to plaintiffs for the pepper in question, seized by the United States Army, and that plaintiffs-petitioners are therefore entitled to recover the full amount demanded in the Complaint, or $190,000, with interest, less the payment of $26,404.14, with interest.

5. In failing to find that the price at which plaintiffs-petitioners could have replaced the said pepper at the first opportunity for so doing was in excess of 50 cents per pound, and that such replacement cost measures the just compensation to which plaintiffs-petitioners are entitled, and that as said replacement value is far in excess of the amount demanded in the Complaint, plaintiffs-petitioners are entitled to the full amount demanded therein.

6. In failing to find that the price at which it was reasonable to estimate in May, 1944, Whole Black Pepper would have sold at that time had there been no War, is a minimum measure of just compensation to plaintiffs-petitioners, which said price was in excess of 20 cents per pound.

7. In failing to find that the net amount which plaintiffs-petitioner could have realized from the use and sale of its pepper as the foundation for synthetic or imitation pepper constituted a factor for determining just compensation and required an allowance therefor of at least 22 cents per pound.

8. In failing to find that the average cost of all of plaintiffs-petitioners' pepper at the time of the requisition here in question was 14.59 cents per pound, and that the average cost of the pepper actually requisitioned was 14.59 cents per pound, and that such amount, plus a fair profit, was in excess of 20 cents per pound, and that such amount constitutes a minimum measure of just compensation.

9. In finding in its 24th Special Finding as follows:

"The total cost of the pepper to Commodities is as follows:

	Pounds	*Per pound*	*Total cost*
Original cost	773,201.00	$0.0621046	$53,143.13
Shrinkage	13,450.12	.....	.....
Cost of pounds delivered in May 1944	759,750.88	.069948	53,143.13
Carrying charges:			
Labor, handling at (average) per bag of .04422			$256.71
Cartage, etc., at (average) per bag of .076			442.31
Storage, at (average) per bag per month of .03			19,591.62
Bank interest, commissions, cables, exchange, etc., amounting to approximately 2.75% per annum			13,672.99
Insurance, at premiums of approximately $4.368 per $100 value for 9 years 4 months			3,377.34
Taxes, on basis of average stored pepper during period 1936 to 1943 inclusive			1,076.67
Total direct costs			91,560.77
Allowance for general administrative expenses at 1% per annum during carrying period, of 9.33% on original cost of $53,143.13			4,958.25
Total costs plus estimated administration expense, or an average cost per pound of $0.127			96,519.02

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs." (R. 21-22)

10. In failing to find that on the 26th day of May, 1944, here was no market in Whole Black Pepper in the United States and none had been offered during any month of the year 1944 prior to October, when the O.P.A. raised the ceiling price to 10¢ per pound.

11. In finding that the ceiling price of 6.75¢ per pound for Whole Black Pepper was approximately the fair market price as of December 11th, 1941 (Spec. Fdg. No. 10, R. 16) and in failing to find that such market was a depressed one.

12. In finding that between September 30th, 1943 and the date of the requisition on May 26th, 1944, very little Whole Black Pepper was sold out of these inventories (inventories of importers) (Spec. Fdg. No. 14, R. 18).

13. In failing to find that the pepper sold by Commodities and referred to in Special Finding No. 19 (R. 19), was sold under pressure and was not a voluntary sale (See Opinion of the Court).

14. In failing to find that the pepper sold by plaintiffs at 6¢ per pound, mentioned in said 19th Finding, was sold under pressure and was not a voluntary sale.

15. In finding that plaintiffs offered to sell 1,000,000 pounds of pepper to the Army at 9¾¢ per pound, as found in Finding No. 22 (R. 20).

16. In finding that between January 1st, 1943, and November 8th, 1943, plaintiff, Commodities Trading Corporation, had sold 98,267 pounds of Whole Black Pepper at 5¢ a pound (Spec. Fdg. No. 22, R. 20), and in failing to find that said sale was not voluntary, but was under pressure.

17. In failing to find in connection with the facts found in said Finding No. 26 (R. 22-23), that it is seven years after

planting before pepper vince produce at a normal rate, and in finding in said 26th Finding that the pepper vine has a bearing period of from ten to fifteen years, with an average bearing period of about eleven years, and in failing to find that the total bearing period does not exceed eleven years, and that the period during which normal production continues does not exceed seven or eight years.

18. In finding in said 26th Finding that new plantings would have begun to bear about 1945 or 1946, and in failing to find that there were no new plantings of any consequence subsequent to 1937 and prior to the Japanese invasion in the Winter of 1942.

19. In failing to give sufficient effect to the market price in British India, at the date of requisition, in finding just compensation.

20. In failing to give sufficient effect in determining just compensation to the "retention value" of plaintiffs' pepper, based upon what plaintiffs could actually have realized for their pepper at the end of price control, if it had not been seized by the Government.

21. In failing to give sufficient effect in determining just compensation to what plaintiffs could probably have received for their pepper upon the end of price control, viewed from conditions as they existed at the time of requisition.

22. In failing to give sufficient effect in determining just compensation to the price which would have obtained in the United States in May 1944 and on May 26th of that year, if there had been no War.

23. In failing to give sufficient effect in determining just compensation to the replacement cost of the requisitioned pepper.

24. In failing to give sufficient effect in determining just compensation to cost plus reasonable profit.

25. In giving effect in its determination of just compensation to plaintiffs' offer to sell to the Army, referred to in Special Finding No. 22 (R. 20).

26. In giving effect to Commodities' petition for an amendment of Price Schedule 52, referred to in Special Finding No. 21 (R. 19-20) in finding the just compensation for the requisitioning of the pepper here in question.

27. In receiving in evidence Defendant's Exhibits Nos. 2, 3 and 4, over plaintiffs' objections (Tr. 199, 201).

28. In refusing to receive in evidence the affidavits of Fletcher H. Long and Ralph W. Olmstead, forming a part of Joint Exhibit "K" in Paragraph 15 of the Stipulation of Facts between the parties.

29. In refusing to receive in evidence Plaintiffs' Exhibit No. 5 for Identification.

30. In finding that part of Finding No. 23 (R. 21) wherein the Court found the market price of Indian pepper at 20¢ instead of 20.99 for May 1944.

31. In failing to find that on or about March 10, 1944, the United States, acting through the War Food Administrator, requisitioned, or attempted to requistion approximately 3,964,800 pounds of Whole Black Pepper owned by plaintiff.

32. In failing to find that plaintiffs instituted an action in the District Court of the United States, District of Columbia, against the Federal Surplus Commodities Corporation, Claude R. Wickard, Individually and as Secretary of Agriculture, and other officials of various divisions of the Department of Agriculture, praying for an injunction to prevent the requisitioning and removal of said pepper on

the ground that said requisition was not authorized by the Act of October 16, 1941, under which such pepper was purportedly requisitioned, in that pepper did not constitute "military or naval equipment, supplies or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions," and that said pepper was requisitioned for civilian use, rather than for the defense of the United States.

33. In failing to find that an answer on behalf of the Governmental Departments and a Motion for Summary Judgment on their behalf were filed in said action on or about May 22, 1944. In support of said motion, and in justification of said requisition or seizure, affidavits of Col. Ralph W. Olmstead, H. C. Albin and Fletcher H. Long were submitted by the Attorney-General. Copies of said affidavits are attached to the Stipulation, Section K thereof and marked Exhibits "J" and "K" and "L", and were offered in evidence by plaintiffs.

34. In failing to find that said affidavits set forth that it was the intention of the Government to requisition approximately 28,000,000 pounds of pepper (which was practically all the pepper in the United States), and to distribute the same among grinders and packers for delivery in part to the general public, and in part for grinding and sale to the Armed Forces of the United States. That said affidavits, as the grounds of said procedure, set forth that for many months it has been impossible to purchase Whole Black Pepper in the United States at the ceiling price fixed by O. P. A.

35. In failing to find that on May 26, 1944, there were free markets for Whole Black Pepper in certain Central

and South American countries, and certain European countries. In those countries, pepper of the kind here in question was selling for from 40¢ to $2.00 per pound.

36. In failing to find that export licenses permitting exports to countries of the Western Hemisphere were required and were granted from time to time to various holders of pepper in 1943, 1944 and 1945.

37. In failing to find that most of this export pepper was restricted as to price by said Regulation 52 of the O. P. A., but higher prices were permitted than in the United States, and plaintiff, Commodities, in 1945 sold upward of 35,000 pounds of white pepper to Argentina at 30.93¢ to 32.31¢ per pound.

38. In failing to find that there is a fairly constant relation between the price of black and white pepper of 5 to 7, because white pepper comes from the same vine as black pepper and black can be transferred into white by a simple process called decortication, which removes the outer layer of the pepper berry, the 31¢ to 32¢ price above referred to was the equivalent of 21¢ plus for black pepper.

39. In failing to find that on May 26, 1944 and from January 1, 1944 to October, 1944, while the O. P. A. was holding down to 6½¢, the price allowed to plaintiff, Commodities, and a very few others, which were classed as bulk dealers, it was permitting wholesalers and grinders to sell ground Lampong black pepper in large quantities at 12½¢ per pound and more.

40. In failing to find that the cost of grinding whole black pepper was only a small fraction of a cent per pound.

41. In failing to find that the pepper for which such prices of 12½¢ and more were allowed was sold in barrels

and the cost of selling was negligible as purchasers would have flocked to the premises of any dealer who would sell legally for that price.

42. In failing to find that on May 26, 1944, and for several years prior thereto, Lampong Black Pepper was sold to consumers usually in small tins or packets containing 1, 1½ or 2 ounces, which retailed at about 10¢. There was little change in the prices of these small packets to consumers, regardless of the fluctuations in the price of pepper.

43. In failing to find that the average consumption of black pepper in the United States for family use was only one-quarter pound per person per year.

44. In failing to find that plaintiff, Commodities, was not allowed at any time while O. P. A. was in existence to replace its requisitioned pepper by purchasing at prices higher than current ceiling prices and it was impossible to purchase at such prices.

45. In failing to find that when pepper was decontrolled was the first time that plaintiff, Commodities, had the opportunity to replace its pepper.

46. In failing to find that the 78,000,000 to 100,000,000 pounds of Whole Black Pepper, found by the Court in its 8th Special Finding of Fact, constituted nearly all of the pepper that there was in the world at that time and was fifteen to twenty times as much pepper as was customarily on storage in the United States before plaintiff-petitioner, Commodities, began its operations.

47. In failing to find that the average price of Lampong black pepper over a period of fifty years preceding the War is 13½¢ and at least that amount over a period of twenty-five or fifteen years.

48. In failing to find that the market price for Whole Black Pepper of the kind here in question was 20.99¢ per pound for May 1944, and the same for June of that year.

49. In failing to find that pepper vines do not produce at all until four years after planting, do not reach normal production until seven years after planting, and then, after seven years of normal bearing, cease to bear.

50. In failing to find that pepper is expensive to plant and requires fertilizer and constant work to protect it from the encroachment of the jungle.

51. In failing to find that the low prices of 1935-40 curtailed planting and by 1937 or 1938 new planting was practically at an end.

52. In failing to find that by 1939, 1940 and 1941, the reduction of planting and the abandonment to the jungle of many of the less economical gardens had had a marked effect upon production and it had fallen in 1941 to less than 60% of the heavy years of 1935, 1936 and 1937, although the weather, which has an important effect, was favorable to the production of a large pepper crop.

53. In failing to find that even had there been no War, there would have been a scarcity of black pepper by May 26th, 1944 and a price in excess of 20¢.

54. In failing to find that had there been no War, there was nothing that would have changed the pattern of the recovery from the low prices existing shortly prior to the War from the pattern of prior recoveries.

55. In failing to find that the Army requisitioned far more Lampong Black Pepper than it needed and had on hand large quantities at the end of the War.

56. In failing to find that efforts were made by dealers and representatives of the pepper trade to induce the Army to return this surplus pepper to the persons from whom it had requisitioned pepper, but the Army refused so to do.

57. In failing to find that on or about the 16th day of November, 1946, plaintiff, Commodities, or its individual stockholders, said plaintiff being in the process of dissolution, were offered by the Government the privilege of purchasing a proportion of the pepper requisitioned from plaintiff, Commodities, at 75¢ per pound.

58. In failing to find that this offer was accepted by some of said Stockholders.

59. In failing to find that there was nothing that would have changed the pattern of this recovery from those of previous cycles.

60. In failing to find that while the ceiling price of 6¾¢ fixed on December 8, 1941, was the same as the market price on the day before the Pearl Harbor attack, the market was depressed by the following factors: (1) some months previously Leon Henderson, the first head of the O. P. A., wholly without authority, demanded that the Produce Exchange in New York City, where contracts for the future delivery of pepper were traded in, increase its margin required on the unit of trading from $250 per unit of thirteen tons to $1,000, and gave notice that the Government would not allow speculators in pepper to make War profits. (2) When in the Fall of 1941 it seemed likely that Japan would go to War and attack the Dutch East Indies, the growers of pepper in Sumatra, where all the Lampong pepper is raised, exported their pepper as fast as they could turn it into cash and prevent it from falling into the hands of the

Japanese. As the United States of America was the only market open to them, this resulted in the dumping of huge quantities on the United States market.

61. In failing to find that the price to which the market for pepper in New York would have risen by May, 1942, if there had been no ceiling price, was 40-50¢ per pound.

Submitted herewith and marked Exhibit "A" is a copy of plaintiffs' printed Request for Special Findings of Fact by the Court below.

C. The Reasons Relied Upon for the Allowance of the Writ

The questions relied upon are Federal questions arising under the Constitution of the United States, and more particularly, of Amendment V thereof, and Public Law 274, 77th Congress, as amended by Public Law 507, 77th Congress, and Public Law 104, 78th Congress.

While this case involves only approximately $150,000, there were two additional requisitions made of pepper of petitioner, Commodities Trading Corporation, by the Army claims for which are now pending before the Court of Claims, and one claim for pepper requisitioned by the United States Navy, the total amount involved is in excess of $500,000. There is at least one additional claim pending for pepper requisitioned from others, and petitioners understand that there are several other claims pending. There are a number of persons interested in these claims, as there are fifteen plaintiffs in the case at bar.

The ultimate question, namely, just compensation to plaintiffs-petitioners for the pepper requisitioned by the Army, or, as this Court has held, the loss incurred or suffered by the requisitionee through such requisition, is one concerning which this Court "has been careful not to reduce the concept to a formula" *U. S.* v. *Cors*, 337 U. S. 325.

Plaintiffs-petitioners, mindful of the above, proved the facts with respect to all of the following bases which have been resorted to by the Courts for determining just compensation, namely:

Market price (in British India); retention value based on what actually happened; retention value based upon what could reasonably have been foreseen at the date of taking; estimated market value at the time of taking if there had been no War; replacement value; value for use in producing imitation or synthetic pepper; cost.

There was no contradiction of plaintiffs-petitioners' proof by defendant, and, indeed, the Court of Claims found facts with respect to each of the above bases substantially as claimed by petitioners. These facts sustained an allowance of more than 20 cents per pound on each basis. But the Court of Claims then found that plaintiffs-petitioners had offered to sell one million pounds of pepper to the Army at 9¾¢ and had asked for certain increases in the ceiling price of pepper that would have brought that ceiling price to about 11¢ per pound at the date of taking if the application had been granted and had made other involuntary sales at less than 20¢.

The offer to sell to the Army and the petition for an increase were shown by evidence received over the objection and exception of the plaintiffs-petitioners, and such action is included in the plaintiffs-petitioners' assignment of errors.

Upon all of the foregoing, the Court of Claims obviously made a compromise decision, giving some effect to the six bases shown by plaintiffs-petitioners, but taking account, also, of the offer to sell and application of plaintiffs above referred to and to defendant's contentions that the ceiling price of 6½¢ was controlling.

Thus, the Court of Claims in stating its conclusion says:

> "Taking into consideration Commodities' costs and the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed, and also these sales at 10 cents, at 14.19 cents, and at 16 cents, we conclude that 15 cents a pound is just compensation." (R. 27)

The sales referred to above were made many months after the requisition here in question and none of the matters stated by the Court was in contradiction of any of plaintiffs' claims.

The questions which will be presented to this Court, if plaintiffs-petitioners' application is allowed, are new and novel and have not been passed upon directly by any Court, so far as known to plaintiffs-petitioners. They are:

1. Where a ceiling price has put a stop to and prevented all dealings in a commodity in the United States, and where such condition has continued for many months, and where the commodity in question is not produced in the United States, but is produced to the extent of many million pounds in a foreign country, British India, and where there was an active market in British India at the time of a requisition of said commodity in the United States, and where such market price in India is a reasonable and fair one, much below the market prices in many other countries of the world, and not excessive, based on the average price for a number of years, and much below the price which could reasonably be expected at the end of the War, is not such market price in India the best measure of just compensation?

2. Where there was no market in the United States, for the reasons and to the extent stated immediately above, and where a commodity requisitioned by the Army is not perishable, but lasts for decades unimpaired in value, and is easily and cheaply storable, is

not the price which it was reasonable to foresee, at the time of seizure, would obtain at the end of the War and upon decontrol, less the cost of storing and carrying the commodity until that time, a proper measure for determining just compensation?

3. Is not the actual profit which plaintiffs-petitioners could have obtained by holding their pepper until decontrol and selling it immediately upon decontrol a proper measure of "retention value" or of replacement cost and of just compensation?

4. Where conditions are such that a shortage in pepper would have existed in May 1944, had there been no War, is not the market price which could reasonably be foretold under those circumstances a minimum amount to allow to plaintiffs-petitioners for the requisitioning of the pepper here in question?

5. Is not the net profit which plaintiffs-petitioners could reasonably have made by using their pepper for producing imitation or synthetic pepper a proper measure for determining just compensation?

6. To what extent is cost to be considered in determining just compensation, and to what extent are gratuitous services and contributions to be included in the cost of a corporation, which was in effect a joint venture by four friends?

7. Where a corporation has embarked upon an enterprise of building up a large inventory of Whole Black Pepper, and where, for nearly one hundred years there has been a cycle of high and low prices fairly evenly spaced at about fourteen years apart, and where there was a practical certainty in May 1944 that by holding said pepper plaintiffs-petitioners could sell at the end of the War at great profit and where, if there had been no War, they could certainly have made a large profit, can just compensation be less than what it could reasonably have expected to realize?

While the fact that plaintiff-petitioner was not a trader or dealer in pepper, and the arguments based on that fact are peculiar to the case at bar, and while the opportunity to prove that there would have been a scarcity of pepper by May 1944, even if there had been no War, and the arguments based thereon are probably restricted to cases involving the requisition of pepper or some other commodity, the production of which cannot be expanded for many years, nevertheless, all the other questions are ones which will, or may, arise in most cases brought to recover just compensation for seizures during the War, and it is in the public interest that those questions be decided.

For these reasons, this case should be brought up by certiorari and the appeal determined by this Court, because not only is it a case of importance, but it involves questions of great importance, which it is in the public interest to have decided by this Court of last resort.

D. Prayer for the Writ

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment of the Court of Claims of the United States, determining that petitioners are entitled to recover of and from the United States a total of only one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63), plus compensation for delay in payment computed at four (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14), and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight

hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid, instead of determining that your petitioners are entitled to recover the amount prayed for in the Complaint, namely, one hundred eighty-eight thousand, five hundred dollars ($188,500.00), with interest, but less $26,404.14 with interest.

Dated: New York, N. Y., July 2, 1949.

EDWARD L. BLACKMAN,
Counsel for Plaintiffs-Petitioners,
120 Broadway,
New York, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Edward L. Blackman, being duly sworn, says:

That he is counsel for all of the plaintiffs-petitioners; that he prepared the foregoing petition and that the allegations thereof are true, as he thoroughly believes.

EDWARD L. BLACKMAN.

Subscribed and Sworn to before me this 2nd day of July, 1949.

SAMUEL COHEN,
[SEAL.] *Notary Public, State of New York,*
Residing in N. Y. Co. No. 370, Reg. No. 219-C-0.

Commission expires March 30, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, et al.,
Plaintiffs-Petitioners,

vs.

THE UNITED STATES,
Defendant-Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

The majority and dissenting opinions of the Court of Claims and the Court's Special Findings of Fact and Conclusions of Law are found on pages 11 to 30 of the Record.

II

Jurisdiction

1. The statutory provision believed by the petitioners to sustain jurisdiction of this Court is Title 28, U. S. Code Annotated, Section 288, as provided by the Act of February 13, 1925, Chapter 229, Section 3, 43 Stat. 939.

2. The Statute involved is Public Law 274, 77th Congress, approved October 16, 1941, Chapter 445, as amended by Public Law 507, 77th Congress, approved March 27, 1942; Public Law 104, 78th Congress, approved June 30, 1943. The pertinent provisions of this Statute are as follows:

> "That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval * * * supplies * * * is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, * * *. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act, * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the Fifth Amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for such property, is unwilling to accept the same as full and complete compensation for such property, he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by Sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be the fair and just compensation for such property. * * *"

3. The judgment of the United States Court of Claims s rendered on the 4th day of April, 1949 (R. 25). This tition was docketed on the 5th day of July, 1949, the 3rd d 4th of July, 1949 being legal holidays.

4. The basic question relied upon by the petitioners to luce this Court to review the decision of the Court of ims is the question of the value of property requisitioned the United States Government from the plaintiffs where, reason of price ceilings and restrictions instituted and forced by the defendant, there did not exist any free rket in the United States for the property requisitioned, t where the property was non-perishable and could have en retained by the Plaintiffs until after the War was over d the price restrictions removed, and in fact was intended be so retained when purchased, and when a value based on each suggested measuring stick, except that of ceiling ice, was considerably in excess of the value found by the urt of Claims.

III

Specification of Errors

The Court of Claims erred:

1. In failing to find that the fair value of 759,750.88 unds of Whole Black Pepper, the subject of this action, s on May 26, 1944, the sum of $188,500 or 22 cents a und and in finding instead that said fair value was 113,-2.63 or 15¢ per pound.

2. In failing to find that the just compensation to which aintiffs are entitled for said property requisitioned and yment by the United States therefor is 22¢ per pound, a total of $188,500, together with interest at 4 per cent %) per annum from May 26, 1944, as an element of just mpensation, less the sum of $26,404.14 paid on November

27th, 1945, with interest thereon from the date of payment, and in finding or concluding ~~instead:~~

> "* * * that the Commodities Trading Corporation, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63), plus compensation for delay in payment computed at (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plantiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14) and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid."

3. In failing to find that the market price of Whole Black Pepper in British India on May 26, 1944, 21¢ per pound, delivered in New York, with freight and insurance paid, constituted a minimum measure of plaintiffs-petitioners' just compensation for the 759,750 pounds of Whole Black Pepper requisitioned by the United States Army from plaintiff, Commodities Trading Corporation, on the 26th day of May, 1944.

4. In failing to find that the "retention value" of plaintiffs-petitioners' said pepper, that is, the difference between the prices which it was reasonable to estimate on the 26th day of May, 1944, would exist at the end of the War and upon decontrol of pepper from Government fixed prices, less the estimated carrying charges from May 26th, 1944 to the expected end of the War and of decontrol, is a proper measure for determining the just compensation to plaintiffs-

for the pepper in question, seized by the United States Army, and that plaintiffs-petitioners are therefore entitled to recover the full amount demanded in the Complaint, or $190,000, with interest, less the payment of $26,404.14, with interest.

5. In failing to find that the price at which plaintiffs-petitioners could have replaced the said pepper at the first opportunity for so doing was in excess of 50 cents per pound, and that such replacement cost measures the just compensation to which plaintiffs-petitioners are entitled, and that as said replacement value is far in excess of the amount demanded in the Complaint, plaintiffs-petitioners are entitled to the full amount demanded therein.

6. In failing to find that the price at which it was reasonable to estimate in May, 1944, Whole Black Pepper would have sold at that time had there been no War, is a minimum measure of just compensation to plaintiffs-petitioners, which said price was in excess of 20 cents per pound.

7. In failing to find that the net amount which plaintiff-petitioner could have realized from the use and sale of its pepper as the foundation for synthetic or imitation pepper constituted a factor for determining just compensation and required an allowance therefor of at least 22 cents per pound.

8. In failing to find that the average cost of all of plaintiffs-petitioners' pepper at the time of the requisition here in question was 14.59 cents per pound, and that the average cost of the pepper actually requisitioned was 14.59 cents per pound, and that such amount, plus a fair profit, was in excess of 20 cents per pound, and that such amount constitutes a minimum measure of just compensation.

9. In failing to find that on the 26th day of May, 1944, there was no market in Whole Black Pepper in the United

States and none had been offered during any month of the year 1944 prior to October, when the O. P. A. raised the ceiling price to 10¢ per pound.

10. In finding that the ceiling price of 6.75¢ per pound for Whole Black Pepper was approximately the fair market price as of December 11th, 1941 (Finding No. 10, R. 16) and in failing to find that such market was a depressed one.

11. In finding that between September 30th, 1943 and the date of the requisition on May 26th, 1944, very little Whole Black Pepper was sold out of these inventories (inventories of importers) (Finding No. 14 R. 18).

12. In failing to find that the pepper sold by Commodities and referred to in Special Finding No. 19 (R. 19), was sold under pressure and was not a voluntary sale (See Opinion of Court R. 27).

14. In failing to find that the pepper sold by plaintiffs at 16¢ per pound, mentioned in said 19th Finding, was sold under pressure and was not a voluntary sale.

15. In finding that plaintiffs offered to sell 1,000,000 pounds of pepper to the Army at 9¾¢ per pound, as found in Finding No. 22 (R. 20).

16. In finding that between January 1st, 1943, and November 8th, 1943, plaintiff, Commodities Trading Corporation, had sold 98,267 pounds of Whole Black Pepper at 6.5¢ a pound (Finding No. 22, R. 20), and in failing to find that said sale was not voluntary, but was under pressure.

17. In failing to find in connection with the facts found in said Finding No. 26 (R. 22-23), that it is seven years after planting before pepper vines produce at a normal rate, and in finding in said 26th Finding that the pepper vine has a bearing period of from ten to fifteen years, with an average

bearing period of about eleven years, and in failing to find that the total bearing period does not exceed eleven years, and that the period during which normal production continues does not exceed seven or eight years.

18. In finding in said 26th Finding (R. 22-23) that new plantings would have begun to bear about 1945 or 1946, and in failing to find that there were no new plantings of any consequence subsequent to 1937 and prior to the Japanese invasion in the Winter of 1942.

19. In failing to give sufficient effect to the market price in British India, at the date of requisition, in finding just compensation.

20. In failing to give sufficient effect in determining just compensation to the "retention value" of plaintiffs' pepper, based upon what plaintiffs could actually have realized for their pepper at the end of price control, if it had not been seized by the Government.

21. In failing to give sufficient effect in determining just compensation to what plaintiffs could probably have received for their pepper upon the end of price control, viewed from conditions as they existed at the time of requisition.

22. In failing to give sufficient effect in determining just compensation to the price which would have obtained in the United States in May, 1944 and on May 26th of that year, if there had been no War.

23. In failing to give sufficient effect in determining just compensation to the replacement cost of the requisitioned pepper.

24. In failing to give sufficient effect in determining just compensation to cost plus reasonable profit.

25. In giving effect in its determination of just compensation to plaintiffs' offer to sell to the Army, referred to in Finding No. 22 (R. 20).

26. In giving effect to Commodities petition for an amendment of Price Schedule 52, referred to in Special Finding No. 21 (R. 19-20) in finding the just compensation for the requisitioning of the pepper here in question.

27. In receiving in evidence Defendant's Exhibits Nos. 3 and 4 (Tr. 199, 201), over plaintiffs' objections.

28. In refusing to receive in evidence the affidavits of Fletcher H. Long and Ralph W. Olmstead, forming a part of Joint Exhibit "K" in Paragraph 15 of the Stipulation of Facts between the parties (Tr. 187-195, 208-211).

29. In refusing to receive in evidence Plaintiffs' Exhibit No. 5 for Identification (Tr. 182-185, 215).

30. In finding that part of Finding No. 23 (R. 21) wherein the Court found the market price of Indian pepper at 20¢ instead of 20.99 for May, 1944 (R. 35).

The above errors present all of the fundamental points raised by plaintiffs-petitioners. However, petitioner attempted to obtain from the Court of Claims findings of fact which would cover its case as fully as possible and made numerous requests to find facts that were in some cases not ultimate but supporting facts. Many of these the Court of Claims failed or refused to find. Defendant has assigned as error such refusals in the specification of errors which appear *supra* at pages 16 to 23 and to avoid encumbering the Record will not repeat them here.

IV. Statement of the Case

This action was begun by Commodities Trading Corporation, a Delaware corporation, hereinafter referred to

as "Commodities," to recover just compensation for 759,750.88 pounds of whole black pepper taken by the War Department, by requisition, on the 26th day of May 1944. (Petition, R. 7-10).

Irving Trust Company, a New York banking corporation, the pledgee of the pepper, for monies advanced in connection with the purchase thereof, was joined as a plaintiff (Spec. Fdg. No. 1, R. 11-13).

After this suit was brought, Commodities was liquidated and this claim was assigned pro rata to its stockholders in accordance with their respective stockholdings in the company. These stockholders were brought in as parties plaintiff by orders of the Court of Claims entered on the 17th and 31st days of March, 1948, respectively. They adopted the proceedings had and requested that said action continue in all respects as if each of said parties had been a party plaintiff from the beginning (Special Findings 1 and 2, R. 11-13).

"The said parties are the lawful owners and holders of said assets or claims" (Spec. Finding 1, R. 11-13).

Commodities presented and prosecuted its claim in accordance with the regulations of the War Department (Special Findings 6 and 7, R. 14-15).

The War Department made no payment to Commodities or to Irving when it seized the said pepper, but some eighteen months later and after suit was brought offered said plaintiffs $52,808.28 as full compensation. This was the O. P. A. ceiling price of 6½¢ per pound and was refused. On November 27th, 1945, $26,404.14, or one-half, was paid to said plaintiff (Special Finding 7, R. 14).

V. Facts

NO FREE MARKET FOR BLACK PEPPER IN THE UNITED STATES AT TIME OF REQUISITION AND NO SALES WHATEVER FOR MANY MONTHS BEFORE AND AFTER THAT TIME

The Court of Claims found:

"15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions."

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October."

At the time of Requisition there was a world-wide shortage of pepper with prices as high as $2.00 per pound (Tr. 95).

COMMODITIES' BUSINESS, PLAN OF OPERATIONS, ACQUISITION OF ITS PEPPER, DESIRE TO KEEP ITS INVENTORY AND INDIFFERENCE TO CEILING PRICES

The above is perhaps best and most succinctly shown by quoting from Defendant's Exhibit 5 which is Commodities'

petition to O.P.A. for an increase in ceiling prices of black pepper dated August 16th, 1944:

"3. Petitioner's business is, and has been, the buying of pepper and holding the same for investment.

"It is not a dealer in pepper in the ordinary sense, but is an investor which began to purchase Black Pepper in 1933 to hold as an investment, principally because of the reduction of the gold content of the dollar and because of the fact that due to the lasting quality of pepper, and the definite cycles of low and high prices to which it has been subject for 75 years, it was a practical certainty that anyone buying at the prices paid by petitioner could sell at a profit if he held on sufficiently long, regardless of changes of price due to the reduction of the gold content of the dollar."

* * * * *

"By 1939 petitioner had accumulated over 25,000,000 pounds of Lampong Black Pepper and its dealings were largely responsible for the fact that the beginning of the War found this country in the fortunate position of having more than ten times as much pepper in storage than was usual during the years prior to this company's operations.

* * * * *

"(a) * * * petitioner purchased its pepper with the intent of carrying an inventory of upwards of 15,000,000 pounds for a number of years. It has never been identified with the spice or pepper trade, has never joined any associations, has never had any definite customers, has always been regarded by the pepper trade as an anomaly and an outsider, and its inventory has never been regarded in the trade as a part of the general pepper supply of the country. The ceiling price of 6.50¢ per pound is much below the cost of petitioner's investment, but until October last, it made no effort to secure any increase in the ceiling

price, and was not interested therein, as it desired to continue to hold its pepper, and it was only when it was informed that pepper was becoming scarce that it considered that it would part with its pepper in the public interest, if it could do so at a price that would not entail a loss; * * *"

"There seems to be an emergency, and petitioner is willing to go much more than half-way to assist the public authorities in meeting such emergency, and is willing to sell its pepper at 10¢ per pound, which is the approximate actual investment which petitioner now has in the pepper which it now owns and which is less than half of what it considers is the fair and reasonable value thereof, and the amount which it should receive as just compensation in case of requisition." (Tr. 217-226).

The relevance and importance of the foregoing facts put in evidence by the defendant is argued infra at pp. 51-60.

An agreement was subsequently made between Commodities and O. P. A. whereby the ceiling price was increased to 10¢ and Commodities agreed to sell upwards of 10,000,000 pounds of its pepper at that price. (Spec. Fdg. 19, R. 19).

Later another bargained increase in the ceiling price was made, this time to 16¢ (Spec. Fdg. 19, R. 33-34).

"PRACTICAL CERTAINTY THAT ANY ONE BUYING AT THE PRICES PAID BY PETITIONER COULD SELL AT A PROFIT IF HE HELD ON SUFFICIENTLY LONG"

The above statement in Defendant's Exh. 5 (Tr. 218) was based upon the definite cycles of low and high prices to which pepper has been subject for 75 years (Finding No. 9, R. 15-16).

In 1927 there was a short crop and prices rose to above 40¢ and remained abnormally high for three years or more (Spec. Fdg. 9, R. 15-16; Tr. 67, 74-75, 99).

Following the abnormally high prices of 1927, 1928 and 1929, prices dropped to an abnormally low price of something more than 3¢ per pound six or seven years later, but had risen to 6.75¢ per pound at the time of the outbreak of the War (Spec. Fdg. 9, R. 15-16, Tr. 14-15, 67).

In 1944 it was evident that very high prices would follow immediately upon decontrol. The existence of such definite cycles of prices shown graphically in said Finding 9 was not accidental, but was the result of definite laws of nature and human proclivities (Tr. 74-75).

The Court of Claims gives a brief description of this as follows: (Spec. Fdg. 26, R. 23)

> "26. The pepper vine which produces Lampong pepper is planted in Sumatra on land cleared out of the jungle. The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years, with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines. The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings . . ."

While the pepper vine does begin to bear 4 years after planting, it does not reach its normal bearing capacity until it is 7 years old. It then bears for approximately 7 years more and then ceases to bear (Tr. 134-135, 159-160).

Its commercial bearing life is 6-9 years (Tr. 134-135, 159-160).

The Court stated correctly that high prices stimulate planting and that later there is heavy production, with consequent low prices. These low prices retard new plant-

ings and lead to neglect of established vines. When gardens are neglected they are quickly reclaimed by the jungle (Tr. 134).

As a result of such cessation of planting and neglect another period of shortage in the future becomes inevitable and the price rises. The natives who produce the pepper see this. They then begin to plant heavily again, and 7 years later there is another period of over-production and another fall in prices begins (Tr. 82-84, 133-138, 160-1).

The abnormally low prices of 1937 to 1939—3¢ plus—so discouraged the natives that practically no new vines were planted from 1937 to Japanese occupation, and many established gardens were allowed to be reclaimed by the jungle. (Tr. 99, 134-135, 138, 143-144). In 1941 there was a decrease of 40% in production. (Tr. 140.)

When Commodities determined upon building up its investment in pepper, it had this historical matter before it, but by January 1, 1942, prior to the invasion of Sumatra by the Japanese, it also had the evidence that the natives, true to form, had stopped planting in 1937 and had neglected established gardens, due to the abnormally low prices of 1935, 1936, 1937 and 1938 and that by the latter part of 1941 another period of shortage in the near future was inevitable with consequent high prices (Tr. 67-9, 139-142).

This matter is discussed more fully infra in connection with the argument with respect to what Commodities lost through the requisition of its pepper, Plaintiff's second point pages 51-56.

BY 1944 A WORLD-WIDE SHORTAGE OF PEPPER EXISTED WITH CONSEQUENT HIGH PRICES

Between March 1942 and Sept. 1943 a world-wide shortage of pepper developed and prices in those countries where dealings were unrestricted had risen greatly and by May 1944 were in excess of 40¢ per pound in most countries of

the western hemisphere and were as much as $2.00 per pound where there was no ceiling price.

In defendant's Exhibit "5," above referred to, it is stated:

> ". . . in England, where there is a ceiling price of approximately 20¢, it is difficult to obtain pepper at that price."

England of course controlled the supply of British India the next largest producer of black pepper after Sumatra (Tr. 12-4, 60-61).

BY MAY 26TH, 1944 THE PEPPER TRADE CORRECTLY FORECAST THAT DECONTROL WOULD BE FOLLOWED BY VERY HIGH PRICES FOR PEPPER

On the above point the Court found:

> "16. There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol." (R. 18)

WHOLE BLACK PEPPER LASTS INDEFINITELY, IS NOT A NECESSARY ARTICLE OF FOOD, COULD NOT BE REQUISITIONED EXCEPT BY ARMY OR NAVY AND COMMODITIES COULD HAVE KEPT ITS PEPPER UNTIL THE END OF CONTROL AT COMPARATIVELY SMALL COST.

Whole black pepper is practically indestructible and lasts indefinitely (Finding 25, R. 22). It is not a necessary article of food. The average consumption is only ¼ pound per person per annum (Tr. 26). It was not necessary for the defense of the United States and at the time of the requisi-

tion here in question the plaintiff had obtained a temporary injunction against members of the Department of Agriculture and others forbidding the taking of its pepper. It was later held by the U. S. District Court that neither the War Powers Act nor any other law conferred such right upon the government. This of course did not apply to a requisition by the Army or Navy (Defendant's Ex. 5, Tr. 220).

No freezing or priority orders had been made with respect to pepper and no restrictions upon sales except the ceiling prices of Reg. 52 and the War Production Board orders restricting purchases by packers and others to 100% then 90% then 60% and finally 40% of prewar purchases (Court's Finding 13 R. 17-18). There were also restrictions with respect to exports. But plaintiff Commodities had the right to hold its pepper until after the war and regulation ended.

The cost to plaintiff of holding its pepper to that time would have been ½ cent per pound per year according to its claims and about ⅛ cent according to the allowance made by O.P.A. (Findings 21 and 24 R. 19-20, 21, Defendant's Exhibit 1.)

BY MAY 26TH, THE PRICE OF WHOLE BLACK PEPPER WOULD HAVE BEEN IN EXCESS OF THE AVERAGE PRICE OF 13½¢ AND WELL ON ITS WAY TO ANOTHER PEAK, IF THERE HAD BEEN NO WAR.

Upon this point the Court of Claims found:

> "26. • • •. If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1944 or 1945, when new plantings would have begun to bear. This decreased supply during the period from 1942 to 1944 or 1945 would have had effect in raising pepper prices in the United States." (R. 22-23)

As new plantings had practically ceased as early as 1937 and as the 1941 crop was produced in good pepper produc-

ing weather but was nevertheless 40% less than the preceding years it will be seen how great was the shrinkage to be expected (Tr. 139-140).

The witness Griesheimer, a native of Holland who had lived in the Dutch East Indies for more than 20 years and who had estimated the Lampong crops for many years as a part of his business gave a very gloomy picture of conditions in 1941 resulting from the abnormally low prices of the preceding years (Tr. 129, 139-142).

The witness, Archibald, who had been a dealer and broker in pepper in New York covering more than 20 years, stated that, in his opinion, the shortage due to the cessation of planting new vines would have affected the market price of pepper to such an extent that by May, 1944 the price would have been in excess of the average price of 13½¢ and would have been well on its way to another peak (Tr. 99-100).

The above quotation from the Court's finding sustains plaintiffs' argument but it contains one error. There was no proof that the natives had resumed or intended to resume planting. There were no new plantings to begin bearing in 1944 or 1945 (Tr. 143). Plaintiffs assigned error to that portion of the finding. (Specification of error No. 18)

THE REASONABLE COST OF PLAINTIFFS' PEPPER, BOTH THAT REQUISITIONED BY THE ARMY AND THE AVERAGE OF ALL ON HAND AT THAT TIME, WAS 14.59¢ PER POUND.

Plaintiff's witness Corbitt who kept Commodities' books testified in detail to the above figures (Tr. 123-124). This is discussed fully *infra* pages 65 to 67.

The Court found cost at 12.7¢ (Finding 24 R. 21-22) but stated that

> "The foregoing costs do not include any amount for officers' salaries, supervision or purchasing, expenses

to commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carying charges but only on Commodities' original Costs." (R. 22)

In its tabulation in said Finding 23 (R. 21-22) it allows for "Bank interest, commissions, cables, exchange etc." only 2.75 per cent per annum, an amount far below what was required. If correction is made for these two errors appearing on the face of said Finding 24 the cost is brought up to that stated by plaintiff's witness Corbitt.

THERE WERE MANY EXCEPTIONS TO REGULATION No. 52 AND MANY OUTLETS FOR PLAINTIFFS' PEPPER AT PRICES FAR IN EXCESS OF THE CEILING PRICE OF 6½¢, THE PRINCIPAL ONES BEING AS FOLLOWS:

(a) Sales to Puerto Rico, Hawaii and Alaska (no license required), but Commodities able to make sales for 14.19¢ per pound. (Finding 20, R. 19)

(b) Sales to Argentina (license required). Commodities able to make sales at comparable price of 20.5¢ per pound (Tr. 120, 80).

(c) Sales of less than one bag. Regulation No. 52 does not apply to quantities of less than one bag, but Food Distribution Order 19 and 19-a restricted bulk dealers such as Commodities from making such sales to regular trade, but permitted sales to Red Cross, Steamship Lines and others.

(d) O.P.A. permitted sales for 16¢ per pound and more of synthetic or imitation pepper, a concoction containing one-quarter real black pepper and three-fourths parched cotton seed hulls and other neutral and cheap agents (Findings 18, R. 18-19).

(e) O.P.A. permitted sales of ground pepper at 12½¢ and more when cost of grinding was less than ½¢ and cost of selling negligible but F.D.A. 19 pre-

vented plaintiffs from using this outlet. (Food Distribution Order 19-1; Finding 13, R. 17-18)

WENTY MILLION POUNDS OF BLACK PEPPER ALLOCATED TO UNITED STATES BY ALLIED FOOD BOARD WAS EXCLUDED BY O.P.A. THOUGH IT WOULD HAVE RELIEVED THE SITUATION GREATLY AND COULD HAVE BEEN PURCHASED FOR 21¢ PER POUND. (FINDING 23, R. 21).

This price is probably the fairest and most tangible basis r allowance to plaintiffs.

British India is the largest producer of black pepper ext to Sumatra and produces from 10,000 to 25,000 tons er year.

There was no ceiling price on pepper in India, but the rice was depressed because of the fact that the British overnment controlled the export of pepper and prevented ipments to points other than England and those under ritish control (Tr. 12, 13, 61, 81).

However, the Allied Food Commission of United States nd Great Britain prior to 1944, and in 1944, allocated everal thousand tons of Indian pepper of substantially ne same kind and grade as that of commodities for United tates consumption. But, while there was no physical imediment to the importation of this pepper, none of it was nported because of the restrictions of Regulation 52, hich made it a crime to buy or sell pepper at higher than ne ceiling price, and because of the refusal of the O.P.A. accede to the importunities of the trade and raise its iling price so that this Indian pepper could be imported nd used in the United States (Finding 23, R. 21).

Upon this point, the Court found:

"23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 per cent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration, Regulation R.P.S. 52 provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i.e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper." (R. 21).

THE GOVERNMENT'S REFUSAL TO RETURN THE EXCESS PEPPER REQUISITIONED AND ITS SELLING OF SAME FOR 75¢ PER POUND AT THE CLOSE OF THE WAR IS RELEVANT ON THE SUBJECT OF THE VALUE OF COMMODITIES' PEPPER AND IS ALSO A STRONG ARGUMENT THAT SOME LIBERALITY SHOULD BE EXERCISED IN ESTIMATING WHAT COMMODITIES LOST THROUGH THE TAKING OF ITS PEPPER.

The Army requisitioned far more Lampong Black Pepper than it needed and had on hand large quantities at the end of the War (Tr. 24-25, 82).

Efforts were made by dealers and representatives of the pepper trade to induce the Army to return this surplus pepper to the persons from whom it had requisitioned pepper, but the Army refused so to do (Tr. 82-83).

On or about the 16th day of November, 1946 plaintiff, Commodities, or its individual stockholders, said plain-

ff being in the process of dissolution, were offered by e Government the privilege of purchasing a proportion the pepper requisitioned from plaintiff, Commodities, 75¢ per pound.

This offer was accepted by some of said Stockholders Tr. 182-186, 215-216).

FIRST POINT

here Was No Market in the United States for Whole Black Pepper in May, 1944

Upon the above point the Court found:

"15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions" (R. 18).

"18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agents.

"This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound" (R. 18-19).

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October. Prior to increasing the ceiling price, the Office of Price Administration and the Department of Agriculture had obtained an informal agreement from Commodities to sell about seven million pounds of its pepper at the 10-cent price, and after the price was so increased in October 1944 Commodities did sell approximately seven million pounds of pepper at that price (R. 19).

"In March 1946, following similar negotiations between Commodities and the Government, the ceiling price of whole black pepper was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of pepper, amounting to about three million pounds, at that price (R. 19).

"These increases were made in order to obtain a distribution of pepper which was not obtainable at the lower ceiling prices, and were made only after negotiations by the Office of Price Administration with Commodities and other dealers in pepper, to the end that large quantities of pepper would be sold upon such increase in ceiling price" (R. 19).

While the above findings support the fact that there was no market in the United States, they do not by any means show the extent of the world-wide scarcity which caused the Department of Agriculture to try to requisition practically all of the pepper in the United States in March, 1944 and which shot prices up to $2 a pound where there were no ceilings against an average price over many years of 13½ cents and a historical high of 42 cents (Finding No. 9, R. 15-16).

Second Point

Whole Black Pepper is not Perishable but Lasts Indefinitely and is Easily Stored. The Reasoning of no one of the Justices in the Felin case * has any application to the Case at Bar.

On the above point the Court of Claims found as follows:

> "25. Whole black pepper is not perishable and will last unimpaired in quality for several decades." (R. 22)

It is not of importance as an article of food and the average annual consumption in the United States is only one-quarter of a pound per person per year. (Tr. 26.) Whole black pepper is easily stored and plaintiff could have held its pepper until the end of the war at an overhead of only approximately one-half of one cent per pound per year, as found by the Court of Claims. (Findings 21 and 24, R. 19-20, 21-22.)

This Court in the *Felin* case, above referred to, by no means held that the ceiling price was the measure of just compensation, particularly where the property taken was not perishable.

The majority opinion reversed the Court of Claims upon the ground that its finding of fact with respect to the cost of replacement was wrong.

In a concurring opinion Mr. Justice Reed with whom Mr. Justice Black and Mr. Justice Murphy concurred, said: ". . . I believe that whenever *perishable* property is taken for public use under controlled-market conditions the constitutionally established maximum price is the only proper standard of 'just compensation'." (p. 643) He later said with respect to the effect of the ceiling price:

> "It would be anomalous to hold that Congress can constitutionally require persons in the position of the

* *United States* v. *Felin & Co.*, 334 U. S. 624.

respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of 'just compensation.' That lawfully fixed market price determines what the perishable article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is 'just compensation.' " (P. 645-6)

Throughout this opinion stress is put upon the fact that the property seized was *perishable*.

On the other hand, Mr. Justice Jackson, with whom Mr. Justice Douglas concurred, states as follows:

"It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Government itself, for the long-range success of price con-

trols, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property.

"The war did not repeal or suspend the Fifth Amendment. *United States* v. *New River Collieries*, 262 U. S. 341, 343; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. But it is obvious that the constitutional guaranty of just compensation for private property taken for public use becomes meaningless if the Government may first, under its 'war powers,' fix the market price and then make its controlled figure the measure of compensation." (p. 651-2)

Thus, two of the Justices of the Court held that a ceiling price should never be considered as fixing just compensation, which view seems to be fair and logical. Three Justices, however, took the view that the ceiling price did measure just compensation *where the property taken was perishable*. They took a practical and realistic view of the situation, holding that because the owner had to sell perishable property and could not sell above the ceiling price, the ceiling price measured all that he could get and therefore the value of the property taken and just compensation. The three Justices, however, who concurred in the prevailing opinion, apparently disagree with the view taken by Justices Reed, Black and Murphy.

Thus, in the prevailing opinion, Mr. Justice Frankfurter stated:

> "We are not passing on the abstract question whether a lawfully established maximum price is the proper measure of 'just compensation' whenever property is taken for public use. We are adjudicating only the precise issues that emerge from this case." (p. 630)

The issue presented to the Court concerned perishable property and the whole question might easily have been determined and the same result reached, by a brief and

simple route,—instead of by a laborious analysis of the facts, if a majority of the Court had agreed with the view of Mr. Justice Reed, above stated. It is plain therefore that those justices were not ready to accept the thesis that ceiling price measures just compensation even where the property taken is perishable.

The ninth Justice, Mr. Justice Rutledge, concurs in the result and agrees in part with the prevailing and concurring opinions, but, on the precise subject here under discussion, he says:

> "It may be, as my Brother Reed and those who join with him think, that the ceiling price in a Wartime controlled market should furnish the measure of Constitutional just compensation for the property of a highly perishable nature." (p. 647)

The Justice, however, rests his decision upon the failure of Felin to sustain the burden of proof of replacement cost.

So we have this situation. Two Justices denied that ceiling price should measure just compensation *in any case.* Three Justices considered that ceiling price was the realistic just compensation *where the property was perishable,* and based their opinions squarely on that fact. One Justice considered that that view might be correct but did not so hold and three Justices declined to pass upon the effect of ceiling price upon just compensation even where the property taken was perishable. Thus it may be said that six expressed themselves on the subject of the effect of ceiling price on just compensation and all six considered that ceiling price did not measure just compensation except where the property taken was perishable. The other three apparently held the same view.

Other facts in the case at bar are as different as could possibly be imagined from those which impelled the conclusions of Mr. Justice Reed above quoted. Thus, he says:

> "It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction." (p. 645-6)

This is a powerful argument in favor of the view taken by those Justices, but it has no relation to the question here presented and to Commodity's property.

The opinion of the Court of Claims states as follows:

> "This so-called retention value is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper. It was rather an investor in pepper. It began buying pepper in 1933 and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it. * * * Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition" (R. 40).

While the above is quoted from the opinion and the Court of Claims made no findings to cover the situation, the facts proven fully covered the same (Tr. 31-36, Special Finding No. 5, R. 14). Requests to find those facts were made to the Court of Claims and the failure of the Court to find such facts is raised by petitioner's assignment of errors with respect to such failure (Pls. Requests for Findings No. 5, 76, 77 and Assignment of Errors 13, 14, 20 in Petition, pp. 15 & 16, *supra*).

Hence, the objection of "economic hibernation or extinction" does not apply to Commodities which was not a dealer in pepper, did not have to sell and did not even wish to sell. Commodities' situation is shown more fully at pages 38 to 42, *supra.*

Thus the situation of Commodities and that of the Felin Co. were as far apart as the poles.

THIRD POINT

Plaintiff lost through the taking of its Pepper, Upwards of $190,000, and suffered Damage through Delay in Payment.

In the prevailing opinion in the *Felin* case, *supra,* this Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction." (p. 641)

and further

> "In enforcing this Constitutional requirement, (the just compensation required by the Fifth Amendment), the question is 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *McGovern* v. *New York,* 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken." (p. 630)

The above is precisely what these plaintiffs claim. Commodities lost 759,750 pounds of its inventory of Whole Black Pepper (Findings 3, R. 13). What must plaintiffs be paid to put them in as good a position pecuniarily as they would have been in if the property had not been taken?

As found by the Court of Claims and as above stated, there was not only no free market in the United States, but there was no market whatever and no Whole Black Pepper had been sold in the United States for months prior to May

26, 1944 (Findings 15 and 19, R. 18-19). There was a world-wide shortage of pepper. The Japanese had taken possession of Sumatra, and India was the only pepper producing country which was not cut off from the allies. Destruction by the Japanese had permanently reduced Sumatra's ability to produce (Tr. 19, 145), and Commodities could have sold in Latin America and other countries for as much as $2.00 a pound if it had not been restricted in exporting and in the price it could charge the foreigner (Tr. 95).

The pepper trade and the technical advisers of the O. P. A. had urged it for months previous to May 26, 1944 to increase the ceiling price of pepper to from 20¢-30¢ per pound and thereby permit the purchase of Indian pepper and the sale of it in the United States at reasonable profit and had warned the O. P. A. that if it refused to follow this advice, decontrol of the price of pepper would see abnormally high prices and the country and the industry would be injured (Findings 16 and 17, R. 18).

At the end of price control the price of pepper immediately shot up to 60¢ per pound and soon to 80¢ (Finding 18, R. 18-19). In May, 1944 it was recognized that such prices would follow decontrol.

Plaintiffs' property was non-perishable, as above shown, and would last indefinitely (Finding 25, R. 22).

They could have held their pepper until decontrol or until offered a fair price.

There was a condition of stalemate. There was a great demand for pepper existing and the price made little difference to the user, the average use being only about one-quarter pound per year (Tr. 26). In these circumstances, the Federal Food Distribution Bureau insisted that Commodities sell, and sought to force it to do so and to requisition its pepper, but O. P. A. refused to increase the ceiling price, and Commodities had been able to maintain its posi-

tion. Thus, although Commodities could not sell at any price which it considered fair, neither could it be forced to part with its property, except for Army or Navy use.

So Commodities lost through the taking of its 759,750 pounds of pepper, property which it could have held to the time of decontrol and for which it could have obtained the high prices prevailing at that time.

From the above, it is plain that plaintiffs suffered a very real loss—a matter of fact and not of fiction. To show the extent of that loss and to measure their just compensation therefore, plaintiffs proved all of the following bases which had been used by the Courts to determine just compensation: retention value, based on amounts which could actually have been obtained as soon as price control was terminated; retention value, based upon what could reasonably have been anticipated in May 1944; market price (Indian); estimated market price in May 1944, if there had been no War; replacement value; net amount obtainable for its pepper through use as basis of imitation pepper; and cost. Each of the said bases required the finding by the Court of Claims of an amount in excess of 20 cents per pound as plaintiffs' just compensation. Each of those bases will be considered separately in the points immediately following.

Fourth Point

The Retention Value of Petitioner's Pepper was Far More than 22¢ a Pound on the Basis of either Actual Prices at the End of Control or Predictable Prices at that Time.

The opinion of the Court of Claims, as quoted above, states:

> "This so-called retention value is particularly applicable in this case. Plaintiff Commodities Trading Corporation is not a trader in pepper. It was rather an investor in pepper" (R. 25).

The Court of Claims found:

> "17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months" (R. 18).

But the opinion shows that "the price shot up to more than 40¢ immediately after restrictions had been removed and it went on up to 75 and 80¢" (R. 26). As plaintiffs are asking only 22¢ per pound, the exact amount which they might have obtained at the end of control and the exact cost of carrying the pepper to that time is of no practical importance.

With respect to the predictable price that plaintiffs could have obtained at the end of control, based on the information existing in May, 1944, we have the following facts:

(a) The world-wide shortage and prices up to $2.00 a pound (Tr. 53-56, 95).

(b) The permanent damage to Sumatra by the Japanese (Tr. 19, 145).

(c) The fact that world consumption ordinarily is more than one hundred and twenty million pounds per annum (Tr. 70).

(d) In March, 1942, seventy-eight to one hundred million pounds of pepper were held in the United States but this constituted nearly all the pepper there was in the world (Finding 8, R. 15). Prior to May, 1944 that one hundred million pounds had been reduced to approximately thirty-two million (Finding 14, R. 18, Tr. 54-56).

(e) The pepper trade and technical advisers of O. P. A. had warned it that if it refused to raise the price to 20¢

or 30¢ per pound the country would see abnormally high prices at decontrol and the industry and the country would be injured. (Findings 16 and 17, R. 18).

All of those facts indicated a price at decontrol approximately equal to the price which actually obtained at that time. But here again we do not have to quibble about small differences in prices as any price which any intelligent person familiar with the trade would have predicted in May, 1944 would have been far in excess of the 22¢ per pound asked by plaintiffs.

FIFTH POINT

The Market Price of Indian Pepper fully Sustains an Allowance of at Least 22¢ a Pound as Just Compensation for Plaintiff's Pepper Requisitioned on May 26, 1944.

The Court of Claims found with respect to the above:

"Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maxi-

mum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper'' (Finding 23, R. 21).

There is no difference in value between Indian pepper and plaintiffs' pepper (Tr. 3-4).

There was a free market in India in that there was no ceiling and the Indians could trade with each other freely. (Tr. 12, 21, 61-2). There was a depressed market, however, because the British Government had put restrictions upon the exportation of pepper from India. (Tr. 12, 13, 61, 81). Otherwise, the price would not have been 21¢ and the price in South America $2.00.

By May 1944, Commodities owned approximately 60% of all the pepper left in the hands of importers in the United States, and all the import pepper was concentrated in a few hands (Finding 14, Tr. 18). There was a loud public clamor for pepper in the Press and in Congress, and the fact that in these circumstances O. P. A. refused to permit the American public to supply itself with pepper at an import cost of less than 4¢ per individual per annum (Tr. 55-57), by letting in the Indian pepper, shows that there was a definite determination on the part of O.P.A. to force the liquidation at low prices of the pepper held by importers in the United States before letting in this Indian pepper. Hence the maintenance of the ceiling price was aimed directly at Commodities.

Without considering whether this was a proper or improper action on the part of O.P.A.,* it does seem plain that such action by it in preventing a market in Indian pepper in the U. S. at a price only one-half of that reached

* As a matter of fact, O.P.A. refused to increase its ceiling price of 6½¢ until directly ordered to do so by Judge Vinson (then Director of Economic Stabilization). (See Amendment to Regulation 52 of October 1944).

in peacetime in 1928 should not deprive these plaintiffs of the benefit of basing their claim for just compensation upon the market price of Indian pepper in May 1944.

India produces approximately 30,000,000 pounds per annum and the market price in such a country is certainly strong evidence of value.

The Indian market price is stated in Finding 23 as May 20¢, June 20.99¢. The May price is an error, probably typographical. The testimony upon which the finding was based was "May 20.99 and June same price" (Tr. 14). This is the cost delivered at the dock. It must then be handled, carted and stored. (Plaintiffs-Petitioners' assigned errors to above finding, No. 30, p. 17 *supra*).

SIXTH POINT

Plaintiffs' claim of 22¢ per pound is only what Commodities could reasonably have realized in May 1944 had no war intervened.

With respect to the above the Court found:

"If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States."

The graph found by the Court of Claims in its ninth finding shows that for 75 years the price of pepper moved in cycles and that those cycles were fairly regular in that the length of time between the several tops and the several bottoms was always about 15 years—the life of the pepper plant. (Findings 9 and 26, R. 16, 22-23). The evidence showed that pepper prices had moved in these cycles for over 100 years. (Tr. 37).

While the Court did not find the amount of the increase in price referred to above and while no witness stated it in cents per pound, the evidence shows that any reasonable estimate would put the total price above 20¢ in May 1944.

In support of the 20¢ price we have the following:

(1) The graph in Finding 9 (R. 15) plus the testimony showing that these cycles of recurring high prices went back 100 years.

Such a history of and by itself showed a high probability of repetition in the future.

The last top was 40¢ in 1928. The next top (no war occurring) should have been about fifteen years later or 1943.

(2) But we have more. The reason for the cycles was shown in Finding 26 as follows: The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines and the proof showed and the Court found that the conditions which had caused the rises in prices in the past had already happened in the years 1936 to 1942 and in a very exaggerated way. (Finding 26, R. 22-23).

The proof was much stronger than the findings and plaintiffs have assigned as errors the failure of the Court to find in accordance with the evidence. Assignment of errors — to —, pp. , *supra*.

The above strengthened the probability in 1941 of a recurrence of high prices in the near future. As the war came in December 1941 facts after that time cannot be considered in this connection. But there was more.

(3) There was direct testimony from an important dealer who had been familiar with the pepper market for 20 years that he knew of no reason why pepper prices should not follow the form of the usual cycle

and that by 1944 they would be in excess of the average and well on their way to another top. (Tr. 99 and 100).

An analysis of the above in connection with the graph in Finding 9 shows, plaintiffs submit, that a price of more than 20¢ by 1944 was most probable even if there had been no war. But there was a war. A war which caused great destruction in Sumatra and cut off all pepper producing countries except India and caused such a shortage of pepper that the price was as high or $2.00 in May 1944 in countries where there was no control. (Tr. 95, 56). The normal world consumption of pepper was over 120,000,000 pounds (Tr. 70). The 100,000,000 pounds which was held by U. S. importers in March 1942 (Finding 8, R. 15) and which was nearly all the pepper that there was in the world (Tr. 3) had been reduced to 28,000,000 pounds by September 1943 (Findings 14, R. 18). These war occasioned matters which increased a probable 20¢ price to an actual $2.00 price were none of them factors which justices of this Court said in the *Cors* Case, should be eliminated in determining just compensation.

Hence plaintiffs' claim to 22¢ should be allowed without question.

SEVENTH POINT

Commodites could have disposed of its pepper in May 1944 for more than 20¢ per pound and therefore its value and just compensation exceeded 20¢ per pound.

The Court of Claims found:

"18. During the years 1943 and 1944 which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground

parched corn, wheat, cotton seed hulls, or other neutral agent.

"This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound."

The situation here is the converse of that which existed in the Felin case. There the Felin Company had no outlet for its pork chops in excess of the ceiling price and some of the Justices considered that this practical situation should be controlling as to value and just compensation.

Here Commodities could have ground its pepper, mixed it with three portions of parched wheat or cotton seed hulls and could then have sold the concoction for 16¢ per pound. As there would be only ¼ pound of pepper in the 16¢ concoction, the pepper itself would sell for 4¢ an ounce. The Court can take judicial notice of the cheapness of wheat or cotton seed hulls.

The cost of grinding black pepper is only a fraction of a cent per pound (Tr. 156):

EIGHTH POINT

Cost plus a reasonable profit justifies and requires an allowance in excess of 20¢ per pound.

The Court of Claims found the cost of plaintiff's pepper to be 12.7¢ (Finding 24, R. 21-22). But in making said finding the Court stated therein as follows:

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period that pepper was purchased and held. No interest is computed upon costs of any of the carrying charges, but only upon Commodities' original cost."

Moreover, the Court of Claims in said finding allowed for "bank interest, commissions, cables, exchange, etc.," only 2.75% per annum.

The interest allowed was not normal of which this Court can take judicial notice.* The interest found by the Court was based on the interest actually paid by Commodities which at one time was only ⅛ of 1% per month (Tr. 175-180). But this was explained by a vice-president of the lending bank who showed that the bank had as collateral for its loans to Commodities, the guarantees of several persons of great wealth, stocks and bonds dealt in on the New York Stock Exchange for many hundreds of thousands of dollars and the pepper itself. It was the safest possible kind of loan.

Moreover, the directors of Commodities kept balances with the bank of over $500,000. The bank was in effect loaning them their own money. And without risk. No wonder it was willing to do so at ⅛ of 1% at one time.

Petitioners have assigned error with respect to the above findings of the Court of Claims.

The Court of Claims in the *Cors* case considered favorably the inclusion in cost of the value of services rendered gratuitously by an owner and this Court apparently approved. Plaintiffs'-petitioners' cost with some important overheads omitted came to 14.49¢ per pound. (Tr. 123-4)

The addition of the value of gratuitous services and proper overhead would bring this figure up to approximately 17½ cents. Then if a reasonable profit for holding and managing the pepper for 9 years is added, the total should not be less than 21¢ or 22¢. So also if the 12.7¢ figure found by the Court of Claims is built up by including interest at a reasonable rate and applying it to *all* of plaintiffs' expenditures in connection with storing and holding its pepper, the cost found by the Court of Claims would be brought up to 16½ to

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* *United States* v. *Cors*, 337 U. S. 325.

17 cents per pound even without important overheads. And if a profit is added for carrying the pepper for nine years, the total exceeds 20¢.

NINTH POINT

The undisputed facts required an allowance for just compensation of more than 22¢ per pound.

There was no issue of fact. Defendant put on the stand only one witness. He did not contradict plaintiffs on any point and they did not contradict him.

The Court of Claims made findings on nearly every main point urged by plaintiffs. These findings were usually watered down statements of what had been proven and of what plaintiffs had requested it to find. Exceptions are assigned to these findings and to the failure of the Court of Claims to find according to the evidence. Hence the numerous errors assigned. However, even the findings actually made justify and require an allowance of the amount demanded in the complaint.

The Court of Claims evidently reduced the amount which it would otherwise have awarded because Commodities, as found by the Court, offered to sell to the Army for 9¾¢ in October 1943 and made application for an increase in the ceiling price of 1/24 of one percent per month for the time pepper had been stored in the United States. (Findings 22 and 21, R. 19-22).

The Court also took into account in reducing the allowance to plaintiffs the fact that it had made a bargain with O. P. A. to sell some of its pepper in October 1944 and again in 1946. These matters were not contradictory of petitioners' claim, were irrelevant and should not have been considered.

Conclusion

The petition for certiorari made by plaintiffs should be granted.

New York, New York, July 4, 1949.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs-Petitioners,

v.

THE UNITED STATES,
Defendant-Respondent.

BRIEF OF PETITIONERS IN REPLY TO THE UNITED STATES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Petitioners,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Brief of Petitioners in Reply to United States.

Opinion Below.

The opinion of the Court of Claims (R. 23-30) is reported at 83 F. Supp. 356.

Jurisdiction.

The judgment of the Court of Claims was entered on April 4, 1949 (R. 30-31). The petition for a writ of certiorari was filed on July 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

Questions Presented.

The ultimate question is of course whether the Court of Claims erred in failing to award Petitioners 22 cents per pound for the Whole Black Pepper requisitioned from them, as stated by Respondent.

However, this ultimate question depended upon several other questions, such as whether the market price in India of Black Pepper delivered in New York (Spec. Fdg. 23, R. 21), or the "retention value" (Spec. Fdg. 25, R. 22; Spec. Fdg. 17, R. 18) or the value of black pepper in 1944, if there had been no War (Spec. Fdg. 9, R. 16; Spec. Fdg. 26, R. 22-23), or each of four other questions, was a measure of just compensation.

An affirmative answer to any one of these questions would have required an affirmative answer that the Court of Claims *had* erred in failing to award 22 cents per pound. These matters can all be considered upon the findings alone and are all broad issues in the field of eminent domain.

A pure question of law is presented by the finding of the Court of Claims that only 15 cents a pound was the fair value of the pepper requisitioned and its conclusion and judgment awarding only that amount (R. 23) in the face of the subordinate findings above referred to that required the allowance of the full amount of 22 cents demanded in the complaint (*United States* v. *Esnault-Pelterie*, 303 U. S. 26, 30, 31).

Moreover where the undisputed evidence presents an issue of law and of broad importance which this Court should determine, petitioners submit that one cannot be deprived of his right to have this Court pass on such issue because the Court below has failed to make the proper findings or has made findings contrary to the evidence.

In the case of *United States* v. *Esnault-Pelterie*, 303 U. S 26, *supra*, the Supreme Court, speaking concerning the scope of review of the Supreme Court upon certiorari to the Court of Claims, said:

> "We are not unmindful of the rule that where, with all the evidence before the court, it appears that no substantial dispute of fact is presented, and

that the case may be determined by a mere comparison of structures and extrinsic evidence is not needed for purposes of explanation, or evaluation of prior art, or to resolve questions of the application of descriptions to subject-matter, the questions of invention and infringement may be determined as questions of law.' *Heald* v. *Rice*, 104 U. S. 737, 749; *Singer Mfg. Co.* v. *Cramer*, 192 U. S. 265, 275; *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 36."

To be on the safe side, these Petitioners presented all seven of the broad questions which they considered were present in the case (Petition for Certiorari, pp. 3-4) and specified as errors all of the instances where they considered that the Court of Claims had made findings against the undisputed evidence, or had failed to find in accordance therewith.

As stated in Petitioners' Brief in Support of its Petition, page 67, there were no contradictions of Petitioners' evidence.

The Statute Involved.

The pertinent portions of the Requisitioning Act are set out in the Petition (p. 30), also in the Government's Petition in case 156.

Statement.

The Government relies in this case on the statement made by it as petitioner in case No. 156. That statement was criticized in the answering brief in that case of these parties, Petitioners here, Respondents there, and reference is made to such criticism (see Brief of Commodities Trading Corp., *et al.* in case No. 156, pp. 1-9). The facts are

fully and accurately set forth in the statement in the Petition of these Petitioners in this case (pp. 1-11; 38-49).

That statement showed that the facts *found* by the Court of Claims justified and required the award to Petitioners of 22 cents per pound for their pepper, but it also showed that there were many other uncontradicted facts in the record which the Court of Claims did not find and which also supported such an award.

Petitioners have a right to refer to uncontradicted evidence in support of their argument (*United States* v. *Esnault-Pelterie*, 303 U. S. 26, 30, 31). But the findings alone are sufficient to present broad issues of law.

Argument.

These Petitioners consider that the situation is just the reverse of that stated in the opening of the Government's argument at page 4.

As stated above under "issues presented" a pure question of law is presented by the finding of the Court of Claims that only 15 cents a pound was the fair value of the pepper requisitioned, and its conclusion and judgment awarding only that amount (R. 23) in the face of subordinate findings that required the allowance of the full amount of 22 cents demanded in the complaint.

This Court said in *United States* v. *Esnault-Pelterie*, 303 U. S. 26, *supra*, at page 31:

> "We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustainable."

Thus, the Court finds the market value of Indian Pepper delivered in New York in May, 1944 (Spec. Fdg. 23, R. 21) (discussed *infra*, pp. 9 to 12), retention value (Spec. Fdg. 25, R. 22; Spec. Fdg. 17, R. 18) (discussed

infra, pp. 15 to 17) imitation pepper with a ceiling price of 16 cents per pound, only one-quarter of which or less was real pepper (Spec. Fdg. 18, R. 18-19) and several other bases for just compensation, each one of which would require an award of the full amount demanded in the complaint. These are all discussed *infra*, pages 3 and 17-18. But, in the face thereof, the Court of Claims awarded only 15 cents per pound. This is explained in its opinion in which it says (R. 27):

> "Taking into consideration * * * and also these sales at 10¢, at 14.19¢ and at 16¢, we conclude that 15¢ a pound is just compensation."

No one of said matters referred to in the above quotation was relevant to reduce Petitioners' compensation below the 22 cent price.

The sale in Puerto Rico was not much more than 1% of Petitioner's holdings. It did not take place until June, 1945, more than a year after the requisition here in question (Spec. Fdg. 20, R. 19). The circumstances of the sale are not shown anywhere. The fact of the sale was proven by Petitioners in order to show that there was an outlet for their Black Pepper at a price more than twice the ceiling price of 6½¢ and they showed that the provisions of Regulation #52, so far as sales to Puerto Rico, Hawaii and Alaska were concerned, were the same in May, 1944 as they were in 1945, and that therefore Petitioners had had an opportunity to make such sales in May, 1944 (Compare Reg. #52 in effect May, 1944 with amendment of October, 1944 in effect June, 1945).

It does not appear what pressure was put upon Petitioners to make this sale, nor any of the circumstances thereof. On the other hand, the President of Commodities testified that no sales had been made willingly (Tr. 31, 33, 36).

Neither should the sales at 10¢ have been given effect by the Court of Claims. In addition to the statement of the President above referred to, we have with respect to these sales the fact that the Government was exercising great, and we submit, improper pressure upon Commodities to force it to sell. That it should have sold a portion of its holdings and lightened its load, under these circumstances, is no proof of the price at which a willing seller would have sold to a willing buyer nor of *just* compensation. Instances of the pressure referred to are as follows:

(1) Seizing Commodities' pepper without *any* payment, in violation of Public Law 274, 77th Cong. approved October 16th, 1941, Chap. 445, as amended (see Petition for Certiorari, p. 30; Complaint, R. 1-4; Spec. Fdgs. 4 and 7, R. 13, 14).

(2) The attempt by the Government to requisition practically all of Petitioner's pepper for civilian use.

It is true that Plaintiffs had obtained a temporary injunction against this procedure and had defeated in the United States District Court for the District of Columbia, a motion for summary judgment by the Attorney General (Tr. 206-208) upon the ground that the statute did not authorize the requisition in question. But that action was still pending. It was War-time and a defeat anywhere along the line would have meant the loss of the pepper.

(3) The O.P.A. had broadcast a distorted and misleading statement of the cost of Petitioner's pepper and had thereby made it appear that Petitioners were grasping, war-profiteers, who were trying to collect two or three times the cost of their pepper (Respondent's Ex. 3, Tr. 199, 165-169).

(4) There was a great shortage of pepper and pickle manufacturers and others who required pepper for their product were undoubtedly suffering (Defendant's Ex. 5, Tr. 217-224).

It seems most unfair that in the circumstances stated above an agreement made by Commodities with O.P.A. and later carried out to sell a substantial part of its pepper at 10¢ a pound if O.P.A. would increase the ceiling price to that figure, should be used as a factor in reducing the allowance for just compensation for a requisition made nearly six months previously (Spec. Fdg. 19, R. 19).

Other Instances of Broad Issues of Law in the Field of Eminent Domain.

The record presents the broad question of the right of an owner of non-perishable property, which it is practical to retain for months or years and until the end of Governmental, Price Control, to a so-called "retention value" as the measure of just compensation (Spec. Fdg. 25, R. 22, pp. 58-60 brief in support).

Another broad question presented is the effect upon the determination of just compensation of a free market in a foreign country where large supplies were available for importation into the United States and where such importation and a market in the United States is prevented only by the refusal of O.P.A. to admit the foreign supplies in face of scarcity in the United States and a drain upon its small holdings to supply South America (Spec. Fdg. 23 R. 21 and brief in support of petition, pp. 60-62).

That situation is just the opposite of the ordinary one where there is no market in the United States because additional supplies are unobtainable.

In the case of black pepper there were governmental restrictions on exportation and prohibition against importations (O.P.A. Price Schedule No. 52; Spec. Fdg. No. 23, R. 21).

Further, the issue whether the Court of Claims could fix a price for Commodities' pepper lower than it could have obtained therefor in the United States in May 1944, if there had been no War (Spec. Fdg. 26, R. 22-23) is another broad general question in the field of eminent domain (see pp. 44-45 in Brief in Support of Petition).

Another broad question is the effect upon the amount to be allowed as just compensation for a requisitioned commodity of the fact that it could be easily and cheaply transformed into a substance, the ceiling price for which would yield a net return more than four times that obtainable by sale of the commodity in its natural state at the ceiling price therefor, and more than the amount asked in the Complaint (Spec. Fdg. 18, R. 18-19 and pp. 64 to 65 of Brief in Support of Petition).

Furthermore, the exclusion from evidence of the affidavits of the Government's officials and employees with respect to pepper, filed by the Attorney-General in opposition to Commodities' injunction suit, and the refusal of the Court of Claims to make Findings of the Facts set forth in said affidavits (Tr. 188-194, 204-5) raises a broad question as to how far statements made by officials or employees of the Government in their official capacities are admissible as admissions against interest.

Again, there is the question whether, in fixing just compensation, which is an equitable proceeding, the Government which has over requisitioned can hold the owner of a requisitioned property to 6½¢ cents per pound therefor or even 15¢, while selling back to him a percentage of the requisitioned property at 75 cents per pound (Tr. 182-186; 215-216).

The criticism at the bottom of page 4 of Respondent's Brief is unfounded. The *findings* of the Court of Claims present the questions which Petitioners seek to have this Court answer. In many instances, the evidence was somewhat stronger than the findings, and in some instances, the Court of Claims found contrary to the evidence, and in other cases it refused or omitted to find in accordance with undisputed evidence. In order to be safe, and to avoid the claim upon the argument before this Court, if this Petition be allowed, that any question was not properly raised, Petitioners assigned error in every case in which the findings of the Court of Claims did not follow the evidence. Petitioners do not, of course, claim that each of these Assignments of Errors constitutes a broad question which this Court should review, but it does contend the seven factors showing value raise broad issues in the field of eminent domain, and that it was safe practice, if not required practice, to assign all of the errors which Petitioners did assign.

Market Price of Indian Pepper Delivered in New York Was a Fair and Tangible Basis for Fixing Just Compensation.

(*Replying to Respondent's Page 5.*)

The situation with respect to black pepper held in India was a most extraordinary one. There was a great unfilled demand for pepper in the United States. In pursuance of our Good Neighbor Policy, we were shipping some of our inadequate supplies to South America and other places. But O.P.A., in the face of all this, refused to allow 20,000,000 pounds of Indian Pepper set aside for the United States by the Joint Food Board to be imported at a reasonable price and used here! (Tr. 9-11, 120-123; Spec. Fdg. 23, R. 21).

Thus, the Court of Claims found:

"15. * * * Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders * * *" (R. 18).

"14. Notwithstanding the foregoing measures taken to conserve this country's supply of black pepper" (orders reducing to 40% of normal the allowable consumption of pepper in the United States), "the inventory in the hands of importers had been reduced" (from 100,000,000) "to about 28,000,000 pounds on September 30, 1943, of which approximately 17,000,000 pounds were held by Commodities * * *" (R. 18).

"16. There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol" (R. 18).

"17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months" (R. 18).

In Finding 23 (R. 21) the Court finds that there was an active market in black pepper in India and that the price delivered in New York, insurance and freight paid, was 20 cents* in May 1944, and concludes its finding as follows:

> "However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, *i. e.*, 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper."

The situation here presented is just the opposite of the usual situation of scarcities in time of War. Usually there is a lack of an adequate supply due to inadequate production or supply on hand plus the amount which can be purchased abroad and imported. Here, however, the scarcity of pepper in the United States was caused deliberately by the O.P.A. There were 20,000,000 pounds of pepper available for immediate importation into the United States (Fdg. 23, R. 21 and 22). This pepper would have been brought into the United States and there would have been a reasonable market in the United States at a reasonable price, at 20 to 30 cents per lb. (Fdg. 16, R. 18) had it not been for the deliberate prevention of this importation by O.P.A. (Fdg. 23, R. 22).

Can the Government prevent trading and a market in the United States and then reject the prices in India which would have prevailed here as evidence of value?

The statement of Respondent, at page 5 of its brief, that Indian Pepper was not actually imported into the United States is not correct. True, it was not imported

*This is a typographical error and should be 21 cents.

in the year 1944, but in 1945, the O.P.A. permitted the Commodity Credit Corporation to buy 300 tons of Indian Pepper and pay the full market price of 23½¢ per pound (Tr. 21 and 22). This was enough pepper to supply every man, woman and child in the United States with the average consumption for a fortnight (Tr. 26).* That pepper was sold by Commodity Credit Corporation to exporters in New York (the classification in which Commodities Trading Corporation was placed), and was sold by them to South America for as much as $1.00 a pound. All with the permission of O.P.A. (Tr. 21-23). There was no change of conditions between 1944 and 1945 (Tr. 23-24).

In addition the Army recognizing the impropriety of making requisitions against the short supply in the United States while there were large untouched supplies available in India, arranged to purchase through Commodity Credit Corporation many hundred tons of this Indian Pepper, which it handed over to the grinders in the U. S., who ground it and packed it in regulation packages for the Army (Tr. 24, 25). That pepper was bought by the grinders at between 21¢ and 23¢ a pound (Tr. 22-24). Finally, at the end of the War, and during control, several hundred tons of this Indian pepper was brought into the U. S. by the Department of Agriculture, which permitted grinders to buy the pepper and to sell it for civilian consumption in the U. S. That privilege was restricted to grinders (Tr. 24-25).

Thus there was an actual market in the United States at 21 to 23 cents in 1945 and thereafter.

Petitioners submit that in such case, the price at which pepper could have been imported and sold in the United States in May 1944 is the minimum amount to allow for just compensation.

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*NOTE 650,000 Lbs. x 52 weeks x 8 equals 270,400,000 Lbs.

Imitation Pepper.

(Replying to Respondent's Page 6.)

Respondent is correct in its statements with regard to the fact that imitation pepper was a new business and that the ceiling price was fixed on a different basis from that fixed for actual pepper under Regulation 52. It is also true that the record does not show that Petitioner ever engaged in the business, but these facts by no means detract from the importance of the ceiling price of 16 cents for that product.

The fact that there was an outlet for pepper in great quantities that would return net about 30 cents per pound after the cost of grinding, packing and purchasing the neutral adulterants (Spec. Fdg. 18, R. 18-19, Petitioners' Brief in Support, pp. 64-65) is certainly a matter of great weight in determining what the value to Commodities of its pepper was at that time—1944.

Respondent says in the note at the bottom of page 6 that the record does not show that Commodities *could* actually have engaged in that business.

But as Respondent says, this was a new business and there seems to be no reason why Petitioners, American citizens, should not have been permitted to engage therein, if they so desired. On the record it must be assumed that they did have the right to engage therein. Petitioners, having proven the business and the ceiling price, it was Respondents' duty to prove that they could not engage therein if that were the fact.

How would an American citizen go about proving his right to engage in a business? Moreover, does not the mere fact that the same article (Whole Black Pepper) could be used in sales generally to the American public by American merchants or dealers in such manner as to yield a net return of 30 cents a pound, make claims of a value of 6½ cents, or even 15 cents, look absurd?

Petitioners' Claims With Respect to the Price of Whole Black Pepper in May 1944, Had There Been No War, Are Fully Supported by the Evidence.

(*Replying to Respondent's Pages 6-7.*)

Respondent's statement with respect to this matter is not correct. There was a most abnormal price of pepper in 1927, 1928 and 1929 (see Chart, R. 16). This produced abnormal planting and a few years later abnormal production (Spec. Fdg. 26, R. 22). This abnormal production caused the lowest prices known to history. These low prices put a stop to new planting and to the proper care of many existing pepper gardens. As a result thereof, the crop in 1941 had fallen off 40% from the crops of previous years (Tr. 139-140) and the Court of Claims found:

> "If there had been no War in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when new plantings would have begun to bear. This decreased supply during the period 1942 to 1945 or 1946 would have had effect in raising prices in the United States" (Spec. Fdg., pp. 22-23).

On the basis of this, experts testified to the extent to which it would have risen by May 1944.

Respondent's criticism of Petitioners' theory and evidence as to what would have happened if there had been no War is unfounded.

There is nothing inconsistent with Petitioners' theory in the fact that pepper prices did not begin to rise until 1941. There had been an abnormal production for several years prior to that year (Tr. 140). This had to be disposed of. 1941 was the first year when the cessation of planting and the neglect of the pepper gardens had had effect. That year's production was 40% less than those of previous years (Tr. 140-141). And the price that year went up from 4.1 cents per pound in January to 6¾ cents per pound by December 7th (Spec. Fdg. 9, R. 15).

But Petitioners' theory presupposed no War. There was a War and the approach of that War caused dislocations and delayed an advance in price, which would probably have taken place earlier. Under normal conditions there would have been no attack on pepper buyers and holders by Mr. Leon Henderson in 1941, no fourfold increase in the margin on contracts for the delivery of pepper, pursuant to his demand, and no dumping on the New York market of their holdings by the War-frightened Sumatrans (Tr. 162, 164, 165). These factors, which did occur in 1941 of course, retarded and delayed the increase in the price of pepper. But we are dealing here with what would have occurred in and prior to May 1944 had there been no War. The history of pepper is that when the price begins to rise due to a scarcity, it rises with great rapidity (see Graph found by the Court of Claims, in its 9th Finding, R. 16). That shows that the last time prior to 1942 when there was a shortage of pepper, the price shot up from approximately 8¢ a pound in 1924 to 33¢ a pound in 1926, and to 40¢ in 1928. There is no sales resistance to purchases of ⅛ lb. per year of a commodity whether the price be 6¢ or 60¢ per lb. Petitioners submit that no one can look at the said chart in Finding 9 and fail to believe that with the known cessation of planting and neglect of gardens which had taken place from 1936 to 1942, due to the abnormally low prices, pepper would have shot up to more than 20¢ a pound by May, 1944. Evidence of a well qualified expert showed that this would have happened (Tr. 99, 100).

Retention Value Is a Fair and Reasonable Measure of Just Compensation for Non-Perishable Easily Stored Property Which Has Been Requisitioned.

(*Replying to Respondent's Page 9.*)

Respondent says of retention value:

> "Such a value does not represent what a willing buyer would pay in cash to a willing seller in a fair market" (Respondent's Brief, p. 9).

That is precisely what it does represent. What a willing buyer at the end of the War and at the end of control will pay to a willing seller after normal conditions have been restored and price control has been removed.

Retention value does not violate the fundamental principle that just compensation is to be determined at the time of taking, as contended by Respondent at page 8 of its Brief.

Retention Value is the value at the time of taking, based upon reasonable probabilities as to the future and as to what the conditions will be at the time of decontrol. It is by no means the actual price which has followed decontrol. On that basis, Petitioners would have received an award of 50 to 60 cents per pound instead of 15 cents (Spec. Fdg. 17, R. 18).

Retention value does not reflect the extreme scarcity resulting from being cut off by the War from foreign sources of supply. On the contrary it is measured by the conditions which will exist when that scarcity has ceased, and normal conditions have been so far restored that price control is ended.

That the Court of Claims had the above conception of retention value and not the fantastic one stated by Respondent is clearly shown by its opinions in *Kaiser* v. *United States*, 69 Fed. Supp. 555, and *Pantex Pressing Machine* v. *U. S.*, 71 Fed. Supp. 859.

Respondent at page 9 of its brief makes the statement that this Court in the *Cors Case* (*U. S.* v. *Cors*, 337 U. S. 325) said "retention value" was "a hold-up value, not a fair market value."

This is a gross distortion. "Retention value", so-called, was not in the case at all, and in the above quoted statement the Court was speaking only of the *enhancement* in the value, of the tugboat requisitioned, caused by the Government's need therefor. Such enhancement in value was called a "hold-up value", and the Court explained: "That is a value which the *Government itself*

created and hence in fairness should not be required to pay."

In the case at bar, the Government had nothing whatever to do with creating or enhancing the "retention value" or any other value of Petitioner's pepper. In fact, its activities, so far as effective, were pointed in the opposite direction.

Petitioners' Cost.

(Replying to Respondent's Page 7.)

Petitioners' cost was found by the Court of Claims, itself, to exceed 12.7¢ per pound by a substantial margin.

While the Court of Claims did find certain factors which added up to 12.7¢ per pound, the very finding in which these figures are included shows that proper elements of cost were excluded.

Thus, the Court says:

> "No interest is computed upon costs for any of the carrying charges, but only on Commodities' original cost."

The money paid for storage over nine years was as much an expenditure as the money paid for the pepper, itself. Interest should have been computed on these large storage charges, as well as on the pepper. Moreover, an allowance of 2.75% per annum for bank interest, commissions, cables, exchange, etc., is clearly inadequate.

The finding of the Court of Claims further stated:

> "The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held."

Does not "just compensation" require an allowance for these factors either as an addition to out-of-pocket cost or as an allowance for holding the pepper for nine years?

This whole matter was discussed at pages 65 to 67 of Petitioners' brief in support of its petition.

The Cases Cited by Respondent in Nowise Conflict With Petitioners' Contentions and in Fact Support Them.

(*See Respondent's Pages 5-9.*)

Bowles v. *Willingham*, 321 U. S. 503, is cited following this statement by Respondent:

> "Petitioners concede and the Court of Claims found that the Indian Pepper was not actually imported into the United States because of valid restrictions imposed by the O. P. A. and no Indian Pepper was sold here."

The case seems to have little connection with the above or with this case. It is a price control case, but not a taking. The page cited refers to the impossibility of fixing rents individually for each Landlord and holds that because the value of some property is hurt does not make the regulation invalid.

The Court justified rent control because "we are not dealing here with a situation which involves a 'taking' of property", and says:

> "By Sec. 4 (d) of the Act, it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.'"

That being the case, it would seem to be true that if the property had been *taken*, the rule would have been different.

Davis v. *Newtown Coal Co.*, 267 U. S. 292, 301, involved a taking of coal and the court said:

> "As announced in *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343, 344, 'where private

> property is taken for public use, and there is a market price prevailing at the time and place of the taking that price is just compensation' to which the owner is entitled. Also, 'the ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

The above in no way contradicts any claim of the petitioners. They do not question the fact that if there is a market at the time and place of taking, such market, in the absence of unusual factors, would measure just compensation.

Indeed, Petitioners urge as the measure of their compensation the market price at the time of taking at the only place in the world where there was a large supply of pepper—millions of pounds—and an active market albeit that market was in India and was prevented from being extended to the United States by the action of O. P. A. (Fdg. 23, R. 21).

On the other hand, the statement of the Court above:

> "The ascertainment of just compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

is precisely what these petitioners contend.

Perry v. *United States*, 294 U. S. 330 was a case arising from the reduction of the gold content of the dollar and was a five to four decision. It has no similarity to the case at bar and can be sustained on the basis of the sovereign's control over currency.

Seaboard Air Line v. *United States*, 261 U. S. 299, 306, involved the taking of land under the Lever Act. The case is cited by respondent for the proposition that

retention value violates a fundamental principle that just compensation must be determined at the time of taking. The Court quotes from its opinion in an earlier case that

> "It was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

The above quotation was used in connection with the Court's holding that the Government should pay interest. However, nothing in the case is contrary to the contentions of these petitioners. The retention value which they claim is the value of their property at the time it was taken (May, 1944), but taking into account that they could have held their property until the end of price control, accepting the costs, burdens and hazards of holding it, but, on the other hand, obtaining what it was reasonable to suppose in 1944 they could have obtained when the War demand and War Restrictions were at an end.

Moreover, this Court pointed out (p. 304 of it sopinion):

> "Just compensation is provided for by the Constitution and the right to it cannot be taken away by Statute. *Its ascertainment is a judicial function.* (*Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 317.)"

United States v. *New River Collieries Co.*, 262 U. S. 341, 344, involved the taking of coal for the Navy. The Court said:

> "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is 'just compensation'."

Had there been such a market, at the time and place of the taking, in the case at bar, there would in all probability have been no requisition because the Government

would have bought and not seized. But the absence of such a market price does not keep out evidence of markets near in time or circumstances. The Court was merely saying that one fact would be conclusive, if it existed, not that all other facts were irrelevant or immaterial.

In that case, the Government tried to show everything else but market value, and to no avail.

There does not seem to be any connection whatever between *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266 and the case at bar. In that case this Court disallowed certain elements of special value which would exist if the land in question were united with other properties not owned by the party whose land was taken. Of course, value is all that one whose property has been taken by the Government is entitled to receive and there is nothing to be added to that value. However, where there is no market and value is difficult of ascertainment, cost has been used as a basis of just compensation. There is nothing in the *Powelson* case contrary to petitioners' claims that something should be allowed to them over and above out-of-pocket expenditures, for their gratuitous services in holding this pepper and managing this business for nine years, be such allowance for gratuitous services or for profit over and above out-of-pocket expenses.

In *United States* v. *Miller,* 317 U. S. 369, the United States condemned a strip of land in connection with a reclamation project. The point in dispute was whether just compensation should be the value of the land at the date when actually taken, or at the date when the United States was committed to the project, the land having been increased in value by the project.

On this point, the Court said:

> "The question, then, is whether the Respondent's lands were probably within the scope of the

> project from the time the Government was committed to it. If they were not but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the Respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Governmen. ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

The decision in no way conflicts with any claim of these Petitioners.

Indeed, the Court in that case went farther than Petitioners ask it to go in this case.

Petitioners make no claim here for any value which was created directly or indirectly in any way by the Government's necessity or by its actions.

However, the Court, in defining "just compensation" says:

> "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

Conclusion.

The petition for certiorari made by plaintiffs should be granted.

New York, New York, October 20, 1949.

Respectfully submitted,

EDWARD L. BLACKMAN,
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120 Broadway,
New York, N. Y.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, ET AL.,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 23-30) is reported at 83 F. Supp. 356.

JURISDICTION

The judgment of the Court of Claims was entered on April 4, 1949 (R. 30-31). The petition for a writ of certiorari was filed on July 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Petitioners have listed seven questions presented (Pet. 25-26) and have specified 61 errors (Pet. 11-23, 31-36), all of which, we submit, are reducible to the single question:

Whether the Court of Claims erred in failing to award petitioners 22 cents per pound for the whole black pepper requisitioned from them.

STATUTE INVOLVED

The pertinent portions of the Requisitioning Act, as it read at the time of the requisition in question, are set out at pp. 2-4 in the Government's petition in No. 156, this Term.

STATEMENT

Petitioners seek review of the same judgment as that involved in *United States* v. *Commodities Trading Corporation,* No. 156, this Term. The "Statement" in the Government's petition, based on the special findings of fact of the Court of Claims, is equally applicable here, and reference thereto is respectfully made. To that "Statement" the following findings, relevant to the present petition, should be added:

Finding 18 (R. 18-19):

> During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made

up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.

This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound.

Finding 23 (R. 21):

Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established

in that schedule, i.e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper.

ARGUMENT

The answer to the question raised by petitioners —whether the Court of Claims erred in not awarding petitioners 22 cents per pound for the whole black pepper requisitioned from them—largely depends on facts, and asserted facts and circumstances, which are unique to a taking of whole black pepper, and which petitioners contend the lower court has not found in their favor. No general issues in the field of eminent domain are presented, and the particular factual contentions urged do not warrant review by this Court. In contrast, the Government's petition in No. 156 raises the general question of the place of a validly established OPA ceiling price in the determination of just compensation—a matter, we submit, of widespread importance.

1. To support their position here, petitioners rely on seven factors (see Pet. 3-4), and they assert the Court of Claims not only failed to accord proper weight to those factors but also failed in several instances properly to find the facts relating to them. The many alleged errors in regard to the court's consideration of these seven elements—especially the failure to find the facts as petitioners see them (Pet. 14-16, 17-23 (Specifications of Errors Nos. 9-18, 30-61), Pet. 33-35, 36 (Second Specifica-

tions of Errors Nos. 9-18, 30)), and the rulings on the admissibility of evidence (Pet. 17, 36 (Specifications of Errors Nos. 27-29))—clearly present no problems meriting certiorari.

a. While it made findings of fact as to the 21 cent market price of Indian pepper delivered at New York (see *supra*,, pp. 3-4) and the net price for whole black pepper used in producing synthetic or imitation pepper (*supra*, pp. 2-3), two of the factors urged as supporting petitioners' claim (Pet. 3, 4-6, 9-10, 46, 47-48, 60-62, 64-65), the Court of Claims properly did not accord these factors any weight.

(1). Petitioners concede (Pet. 5, 47), and the Court of Claims found (R. 21), that the Indian pepper was not actually imported into the United States because of valid restrictions imposed by the Office of Price Administration, and no Indian pepper was sold here. Cf. *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. A. 2); *Bowles* v. *Willingham*, 321 U. S. 503, 517. The price of that pepper, therefore, was not, as petitioners claim (Pet. 47), "probably the fairest and most tangible basis for allowance to plaintiffs"; on the contrary, it had no relationship whatever to petitioners' damages or to the value of the requisitioned pepper at the time and place of taking in the United States, since American buyers and sellers could not lawfully avail themselves of this Indian pepper. See *United States* v. *New River Collieries*, 262 U. S. 341, 344; *Davis* v. *New-*

ton Coal Co., 267 U. S. 292, 301; *Perry* v. *United States*, 294 U. S. 330, 354-358; cf Brief for the United States, in *United States* v. *The Toronto, Hamilton, and Buffalo Navigation Company*, this Term, No. 39, pp. 32-39.

(2). Comparison with the net price for whole black pepper used in producing imitation black pepper similarly has no place here, for imitation black pepper is a different commodity from whole black pepper, and like whole black pepper, was subject to an OPA price ceiling. Imitation pepper was a new product, its production a new business, and hence the ceiling price fixed for it as a newly manufactured produce was established on a different basis from those for products traded prior to the imposition of price controls. See Section 202 of the Emergency Price Control Act of 1942, 50 U. S. C. App. 922.[1]

b. As to the other factors petitioners mention, the Court of Claims did consider them, among others, in determining just compensation, and, we believe, accorded them more than sufficient weight.

(1). The court, in considering "the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, had there been no war" (Pet. 3), accepted in part the theory that there was a

[1] Despite the 30 cents per pound price petitioner now says it could have secured by manufacturing imitation black pepper (Pet. 3, 65), the record contains nothing to indicate that petitioners ever engaged in this business, or could actually have done so.

fairly constant and therefore predictable movement of black pepper price, and made allowance for this factor in its award of 15 cents a pound (R. 26, 22-23, 27).[2] This theory, however, does not accord with the facts as shown by petitioners' own operations, for under this theory the price of whole black pepper should have started to rise in 1939, whereas, in fact, it continued to fall (R. 15). It was, therefore, impossible to predict with any accuracy what the price of pepper would have been in 1944 if there had been no war, and if error was committed by the Court of Claims it was wholly in petitioners' favor.

(2). The factor of "cost plus a reasonable profit for holding the pepper for an average period of eight years" (Pet. 4) is no more than an attack upon the court's finding of a cost of 12.7 cents per pound, as too low. That cost, petitioners claim (Pet. 66), should be "built up" by the inclusion of hypothetical costs plus a profit for each year that they held the pepper. Not only does just compensation include only actual costs, but it requires that the owner be awarded the value of his property, not a profit on it. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S.

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[2] The finding of the Court of Claims on this point is not as strongly stated as petitioners' version. The court found (R. 22-23):

> * * * If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States.

266, 281-282. Indeed, the cost of the pepper was substantially below even the amount found by the Court of Claims, as is indicated by OPA's cost computations on the more realistic "first in, first out" basis, and by petitioners' offer to sell 1,000,000 pounds to the War Department at 9¾ cents per pound (R. 20), as well as their subsequent agreement with OPA to sell 7,000,000 pounds at 10 cents per pound (R. 19).

(3). The remaining three factors (see Pet. 3)[3] are merely different formulations of the so-called "retention value" on which the Court of Claims in large measure predicated its finding of just compensation (R. 25, 27). As we point out in the Government's petition in No. 156 (pp. 21-23), not only does the use of "retention value" as a measure of just compensation violate the fundamental principle that just compensation is to be determined at the time of taking (see *e.g. Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306), but its use here results in compensating petitioners for the pepper's special value to them for speculative purposes. The retention value of pepper at that time reflected the extreme scarcity of pepper resulting

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[3] "(b) the price which, in May 1944, it was reasonable to expect could be obtained for Whole Black Pepper at the end of the War, less carrying charges to that time, pepper being non-perishable and easily stored";

"(c) the price which plaintiffs-petitioners could actually have obtained for the pepper at the time of decontrol, less carrying charges from May 1944 to that date"; and

* * * * * * *

"(e) the replacement cost—more than 50¢ per pound".

from our being cut off by the war from our foreign sources of supply. Such a value does not represent "what a 'willing buyer would pay in cash to a willing seller,' *United States* v. *Miller* [317 U. S. 369], 374, in a fair market" *United States* v. *Cors*, 337 U. S. 325, 333. As stated in the *Cors* case (337 U. S. at 334), such value is "a hold-up value, not a fair market value" and hence, far from being a proper measure of just compensation, should not have even been considered as an element in its determination.[4] Nevertheless, the court below did consider this factor and made a judgment, in the individual circumstances presented to it, as to the amount of "retention value" for which compensation should be made here. Petitioners' limited disagreement with the extent of the Court of Claims' specific determination of the amount of this type of value in this particular case presents no ground for review.

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[4] In *Lord Mfg. Co.* v. *United States*, C. Cls. Nos. 46573, 47328, 84 F. Supp. 748 (decided July 11, 1949), the Court of Claims —in upholding contract repricing orders administratively issued by the War and Navy Departments during the war— heavily stressed the close connection between the fact of a wartime emergency and the determination of just compensation, and refused to accede to the monopoly demands of the contractor in that case. "Many other facts might be recited as contributing during the emergency to the question of what constitutes just compensation, but certainly it would not be fair when the price of food, the wages of labor and the prices of all other materials going into the war effort were being controlled, to permit a market value based on what almost amounted to a monopoly, plus a shortage of material elements, to constitute the measure of just compensation * * * the doctrine that prices may be based on what the traffic will bear has no place in our national economy at such a time". 84 F. Supp., at 755-756.

2. The fact that the instant petition and that of the Government in No. 156 seek review of the same judgment of the Court of Claims does not justify the granting of the writ at petitioners' plea. As we have shown above, petitioners' contentions that the Court of Claims erred in not awarding them 22 cents per pound for the requisitioned pepper are based primarily on factual matters. These factors are pertinent only to petitioners' argument that they were entitled to 22 cents per pound rather than 15 cents, and bear only remotely on the broad legal question raised by the Government's petition, i.e. whether OPA ceiling prices may be a proper measure of just compensation for property requisitioned for war purposes. Indeed, the issues involved here arise after the question presented in No. 156 is disposed of, and are reached only if that question is resolved adversely to the Government's position. Even in that event, petitioners' issues are not of the character meriting decision by this Court.

CONCLUSION

The judgment awards petitioners more than they are entitled to. The question raised is largely factual and presents no issue of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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H. G. MORISON,
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PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

OCTOBER 1949.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION and others,
Defendants in Error.

MOTION TO STAY ISSUANCE OF MANDATE

EDWARD L. BLACKMAN,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs-Petitioners,

vs.

THE UNITED STATES,
Defendant-Respondent.

No. 156

THE UNITED STATES,
Plaintiff-Petitioner,

vs.

COMMODITIES TRADING CORPORATION and others,
Defendants-Respondents.

MOTION TO STAY ISSUANCE OF MANDATE

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Commodities Trading Corporation, et als., the plaintiffs in error in the above entitled cause No. 163 and defendants in error in the above entitled cause No. 156 and show to this Court that:

(1) Commodities Trading Corporation, et als., are herewith filing their petition for a rehearing of these causes

and for a modification of the orders and judgments of this Court, filed herein on the 27th day of March, 1950, to the extent and for purposes and reasons set forth in said petition;

(2) Under Rule 34 of this Court the mandate of this Court "will issue as of course after the expiration of 25 days from the day the judgment was entered, irrespective of the filing of a petition for rehearing unless the time is shortened or enlarged by order of this Court, or a Justice thereof, when this Court is not in session".

(3) In view of the nature of such petition for rehearing and modification and the ends sought to be accomplished thereby, no useful purpose would be subserved if the mandate or other process of this Court should issue before the Court has disposed of such petition, but would cause unnecessary complications and delay.

WHEREFORE, Commodities Trading Corporation, et als., pray that the mandate of this Court be stayed and withheld until the said petition has been finally disposed of.

Dated April 10th, 1950.

EDWARD L. BLACKMAN,
Counsel for COMMODITIES TRADING CORPORATION, *et als.*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION and others,
Defendants in Error.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION and others,
Defendants in Error.

PETITION FOR REHEARING

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Commodities Trading Corporation, et als., plaintiffs in error in the above entitled cause, No. 163, and defendants in error in the above entitled cause No. 156, which said causes were cross-appeals from the same judgment of the Court of Claims, and in which causes judgment

was rendered by this Court reversing the said judgment of the Court of Claims, said judgment of this Court having been entered on the 27th day of March, 1950, and within fifteen days therefrom and at the same term of Court, present their petition for rehearing of the above entitled causes and in support thereof, respectfully show

That this Court in reversing the judgment of the Court of Claims on the ground that that Court found a value for petitioner's pepper on May 26, 1944 in excess of the established ceiling price of 6.63 cents per pound on that day for said pepper appears to have overlooked the following matters and facts:

I.

This Court in ruling out so-called retention value raised objections thereto which were applicable to the findings of the Court of Claims, but overlooked the fact that its criticisms did not apply to the undisputed evidence in the record.

Thus, the findings of the Court of Claims were in many cases inconclusive and weak where the evidence was direct and strong.

The opinion of the Court of Claims states:

> "This so-called retention value is particularly applicable in this case." And, further, "a very great increase in price was inevitable upon the removal of restrictions." (R. 25)

but it did not find as facts much of the undisputed evidence presented by Commodities to sustain that statement.

Commodities filed exceptions to each deviation from the evidence and from each failure to find in accordance therewith, and assigned such deviations as errors in its petition for certiorari to this Court. The following assignments of error relate to the Court of Claims failure to make factual

findings supporting its finding of "Retention Value". (Assignments of Error, Nos. 17, 18, 20-22, 49-54.)

This Court, in rejecting so-called retention value said

> "A persuasive reason against the general rule declared by the Court of Claims is the highly speculative nature of proof to show possible future prices * * *. Predictions on these subjects were guesses, not informed forecasts."

But the Court also said:

> "And exceptional circumstances can be conceived which would justify resort to evidential forecasts of potential future values in order to determine present market value."

Commodities submits that if ever a case could be presented wherein it was proper to consider potential future values in order to determine present market value, the case at bar is that case.

The facts show not a possibility or a probability of a great shortage in the supply of pepper at the end of the War, *whenever that time might come*, but certainty of a great shortage.

Commodities freely concedes that the post-control prices could not be definitely determined, or the extent to which the lifting of war controls would raise prices above the controlled ceilings.

It submits, however, that this Court overlooked the inevitableness of post-control prices substantially in excess of the ceiling prices, and of the 15 cents allowed by the Court of Claims.

Considering the facts more in detail in support of Commodities claim that the circumstances here were exceptional and did justify resort to forecasts of potential future values:

(a) A pepper shortage was on the way, war or no war:

Pepper was a difficult and expensive crop to plant and required, after planting, constant cultivation and care to

protect it from being swallowed up by the jungle (R. 98-99); no production from the pepper vines was obtainable for the first four years after planting, but from four to seven years after planting there was some production, with normal production obtained at the end of the seventh year (R. 99, 107). Moreover the plant did not continue to live beyond fifteen years in all on the average—eleven years after it first began to bear—and constant new planting was therefore necessary to maintain production (Fdg. No. 26, R. 22, 99).

For approximately five years immediately preceding invasion of Indonesia by the Japanese in February 1942, there had been practically no planting of new vines (R. 101-2, 107), but, on the other hand, established gardens were neglected and the jungle was permitted to reclaim them, due to the unprecedented low prices (R. 100, Fdg. 26, R. 22).

(b) The Japanese war served to greatly intensify the inevitable cycle:

It was further shown that pepper production suffered greatly and permanently from the Japanese invasion and that it would be much smaller by reason thereof than it had been before the War (R. 45).

Finally, it was shown that after the Japanese invasion and throughout the Japanese occupation, the native "instead of planting pepper, he brought down his vines and started planting foodstuffs." (R. 102)

All this had taken place and was well-known prior to May 26, 1944.

There was no word offered by the Government in contradiction of or in modification of any of the above.

The Court correctly says that no one could foresee the date of the termination of the War, and makes this as a most important argument against the consideration of market price at the end of the War, but the Court overlooks the fact that the longer the War lasted, the greater the shortage of pepper would be.

For Sumatra was practically our sole source of supply, and until four years after the natives began to replant pepper, there would be no pepper from new vines, and until seven years thereafter there would be no substantial amount from new vines (R. 97-99). In the meantime, the eleven year life of all the old vines planted before the War and before the cessation of planting in 1936 would have expired (R. 99).

So much for the proof of supply.

The proof also showed that for two thousand years there has been a constant demand for pepper in a large part of the civilized world and that consumption per person is so small (⅛ lb. per annum for household consumption and ¼ lb. including industrial use, R. 50) that the demand is not affected by the price, particularly as the price to the consumer of the small containers in which he purchases pepper does not change with even violent changes in the wholesale price of whole black pepper. (R. 50)

(c) With a normal demand so great a shortage must result in greatly increased prices as soon as repressive ceiling was removed.

With a normal prewar demand as shown above and with the definite shortage above explained, it was certain that something would happen akin to what has actually happened, namely, a price for pepper rising from 50 to 60 cents at the date of decontrol to $1.40 at the present time (Fdg. 17, R. 18).

While the above has been due in some part to inflation, and while no one could prophesy precisely what would take place, any tyro familiar with the pepper business would know that decontrol would be followed by high prices many times 6½ cents no matter when it took place.

The Court said at p. 5 of its opinion:

> "But the general Constitutional rule declared and applied by the Court of Claims did not rest on exceptional circumstances."

The Court overlooks the fact that the cases where the Court of Claims allowed retention values were exceptional and in the case at bar in its opinion (R-26) uses the following language:

> "Commodities bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must *inevitably* come." (Italics ours)

and further:

> "A very great increase in price was *inevitable* upon the removal of restrictions". (Italics ours)

For a Court to state that a future price is *inevitable* shows most exceptional circumstances and it appears that the theory of the Court of Claims with respect to so-called "retention value" does not depart from the opinion of this Court that only in exceptional circumstances can proof with respect to future prices be considered as evidence bearing upon present just compensation.

In *Kaiser* v. *The United States*, 69 Fed. Supp. 555, the property requisitioned consisted of partly manufactured brass material which the Government claimed the right to requisition at the price for scrap.

The plaintiff's business was an established business, its product was in general use and it was, humanly speaking, certain that the manufactured parts would be usable in its product at the end of the War. The Court of Claims cut severely the probable value to allow for capital tie-up, expense of storage, deterioration, and other factors.

This was an unusual situation where the property was sure to be usable at the end of control, and where the work done in processing the material would have substantial value.

The Court was very conservative in its allowance and the just compensation was less than anyone would say the

Kaiser Company was practically sure to get at the end of the War.

In *Pantex Pressing Machine Company* v. *The United States*, 71 Fed. Supp. 859, the War Production Board requisitioned aluminum, in a manufactured form of parts for certain dry-cleaning and pressing machinery, having offered the program price of 13½ cents per pound for aluminum. The proof showed that the parts had a value considerably in excess of that figure by reason of their post-war usefulness and a cost in excess of the said program price. The Court allowed an amount equal to the program price for certain obsolete parts and considerably in excess of the program price for those parts which would be usable after wartime restrictions were removed.

II.

This Court overlooked the fact that by making no allowance for so-called "retention value" and by restricting the compensation for Commodities' pepper to only a part of its value and to a part of the loss which Commodities incurred through the requisitioning thereof, it was proceeding in contradiction of the rule for just compensation which has been established by this and other courts for many years.

In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, referred to by the Court in its note on page 3 of this Court's opinion herein, the Supreme Court said

> "There can, in view of the combination of those two words (just compensation), be no doubt that the compensation must be a full and perfect equivalent for the property taken."

And later:

> "The legislature may determine what private property is needed for public purposes * * * but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the

> public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

This was merely a restatement of what was the settled law in 1892, and since that time there have been numerous decisions of this Court to the same effect, and numerous decisions of State Courts defining similar provisions in State Constitutions in the same manner and holding that the full loss of the owner must be compensated for.

See the following cases where the foregoing conception of "just compensation" was expressed:

Seaboard Airline Ry. v. *United States*, 261 U. S. 299, 304;
United States v. *New River Collieries Co.*, 262 U. S. 341, 343;
United States v. *Miller*, 317 U. S. 369, 373;
United States v. *John J. Felin Co. Inc.*, 334 U. S. 624.

In the case at bar, this Court does not overrule those decisions, and even in the recent case of the *Felin Company*, no one of the nine judges who passed on just compensation in the four opinions written, suggested that the *Felin Company* was not entitled to "just compensation" measured by what it had actually lost.

In that case the concurring opinion of Mr. Justice Reed went further than any previously decided case in suggesting that the loss of the owner of property requisitioned could not be greater than the ceiling price fixed therefor when the property *was perishable*. That is to say, that the Government can by one lawful act destroy all present value in a property in excess of a fixed price, and then may requisition at that fixed price.

However, in the *Felin Case*, the Felin Company had to sell its pork chops. It could not sell for more than the ceiling price, and the Court argued that the property had no present value greater than such fixed price and the Felin Company suffered no loss through the taking of its chops, in excess of the price at which they could have been sold presently, *when the selling was a "must"*.

The majority of the Court seems to have accepted that theory in the case at bar, and Commodities recognizes the logic thereof and bows thereto. However, it submits that the ceiling prices applied to pepper did not destroy all value in excess of 6.63 cents per pound, but that the undisputed evidence showed a large residue of value greater than such ceiling price and above 15 cents, measured by the right and ability to hold till decontrol and sell at the prices then obtaining, less a discount for expenses.

Thus, the value of the property for the purpose of determining "just compensation" in cases where there are lawful Governmental restrictions upon its use, is only that part of its full value that remains after giving effect to the depressing influences of the Governmental restrictions. However the loss occasioned by the taking of a commodity which lasts unimpaired in value, which is easily and cheaply stored, is greater than the ceiling price, where it can be shown that the market price at the end of price control, less the costs and hazards of keeping and storing until that time, will be substantially greater than the ceiling price.

For illustration, with pepper selling at $2.00 a pound in countries where there was no price control, and where it was physically possible for Commodities to take its pepper to such market, we may start with $2.00 as the full or intrinsic value of black pepper, which of course had a world market. But exports of pepper from the United States were restricted and prices for such exports were also restricted. Furthermore, ceiling prices restricted the amount which could be obtained currently upon sales in the United States.

Thus, the intrinsic value was cut down to what could be expected at the end of control as a practical certainty, less a reasonable discount for the expense and delay in holding until that time.

The expression "retention value" is not descriptive and was, perhaps, an unfortunate choice of words. A more definite and accurate description of the factor in question is "remaining value", remaining after giving effect to governmental restrictions.

What the Court of Claims was striving for and what Commodities was asking was the actual loss which it sustained by reason of the taking of its pepper.

As to the market price at the end of control it was the unanimous opinion of the Spice Trade in 1944 that such prices would be substantially in excess of 30 cents per pound. They had risen to over 40 cents a pound in 1926 because of a crop failure in one year. They were from 50 to 60 cents. Thus, an award of 15 cents a pound was most moderate.

III.

The Court overlooked the importance of the fact that a scarcity of pepper by 1944, with consequent high prices was inevitable (Fdgs. 9, 26, R. 16, 22-3). The War only accentuated this scarcity. This importance is enhanced by the opinion of the Court, which states as follows:

> "Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

The undisputed evidence showed that due to the abnormally low prices for pepper which had prevailed for five years or more previous to the invasion of Sumatra in February, 1942, there had been no planting of new pepper for five years previous to that time and that pepper gardens

had been neglected and allowed to be reclaimed by the jungle, with the inevitable result, in view of the characteristics of the pepper plant, that there would be a definite shortage of pepper following 1942 and extending until 1948 or 1949, if there had been no War (R. 99-102).

This would have inevitably caused high prices by 1944, much higher than the ceiling price. The effect of the War was to destroy pepper and reduce the supply and increase prices where uncontrolled. In such circumstances there was nothing "just" in the Government's maintaining a ceiling price for pepper in 1944 lower than it would have been had there been no War and taking Commodities' property at that price.

Moreover when Commodities' pepper was taken from it in 1944 at a time when there was a real scarcity (R. 46, 102) and an actual high price for pepper throughout the world wherever the price was not kept down by Government control, it would not have been fair or just to Commodities to pay it for its high priced and enhanced valued pepper at an amount less than the pepper would have been worth if there had been no additional scarcity caused by War.

IV.

In stating that the ceiling price was fair and just to the trade in 1944 this Court overlooks the fact that there was a unanimous opinion, except for O. P. A., that the price was unfair.

Thus, when the Army desired a million pounds of pepper in October, 1943, Commodities offering to sell at less than cost, fixed a price of 9¾ cents per pound. This the Army accepted. (Fdg. 22, R. 20) The Committee of the Spice Trade was unanimous in urging O. P. A. to increase its price to 20 cents and let in the Indian pepper. (Fdg. 16, R. 18, 42, 46).

The Department of Agriculture and the Joint Control Board arranged for the ear-marking of 20,000,000 pounds of Indian Pepper to be imported at the Indian Market Price, which was then 21 cents per pound (R. 42).

The ceiling price in England, which controlled the production of practically all new pepper, was 25 cents per pound.

There was a depressed market at the time the ceiling price was first fixed, (R. 89-90, 108-109, Fdg. 8, R. 15) but, be that as it may, there was a complete change in the situation between February, 1942 and May, 1944. (Fdg. 14, R. 18, 60, 79, 46, 102)

V.

Commodities has sustained the burden of proving special conditions and hardships peculiarly applicable to it. Commodities was not a regular dealer in pepper and for this reason was deprived of rights which the O. P. A. conferred upon regular dealers who were distributors of pepper. (Fdg. 5, R. 13-14, 45-46)

Thus, other importers of large quantities of Whole Black Pepper termed "bulk dealers", such as the witness Catz, were permitted to grind and sell their pepper as ground pepper, but this was denied to Commodities except with respect to certain limited purchasers such as Red Cross Steamships, etc. (R. 45-46; F. D. O. 19)

Moreover, other dealers whose practice it was to buy and sell pepper, turning it over quickly, were allowed the same price as Commodities, which was an investor and had stored its pepper, some of it for as much as eleven years. The country was benefited by the unusual fact of Commodities accumulating 25 million pounds over a long period of years. (Fdg. 5, R. 13-14) This accumulation could not have been made without dislocating the market unless it had been made over a number of years. But this involved storage and carrying charges, for which no allowance has been made to Commodities. (Fdg. 24, R. 21-22)

The statement of the Court that the situation of Commodities differed only in degree, if at all, from that of myriad commodity owners who quite naturally wished to hold their goods for higher prices overlooks the fact that Commodities is asking no more than the market price would have been in 1944 if there had been no War.

Moreover, dealers generally must continue to sell their trade and in very few cases would an owner of property be justified on a purely business basis of holding a large inventory until the end of the War in the hope that the market price at that time might be higher.

There is no comparison between Commodities and the ordinary merchant.

VI.

This Court overlooked the fact that unless the petitioners planned to sell their pepper during price-control, which of course they did not plan to do, there was neither reason nor obligation impelling them to challenge the ceiling price which at best was a purely temporary restriction.

This Court in emphasizing the right of review of a ceiling price also has overlooked the fact that the Emergency Price Control Act as it stood in May, 1944 and from the beginning until June 30, 1944 when the limitations of the Act were recognized and it was amended, provided for a review of the ceiling price in name but not in fact. (Title 50, U. S. C. A. § 923)

Thus, a protest was required to be made within sixty days after the ceiling price was fixed. If no such protest was made the ceiling price could not be attacked.

Furthermore, the review by the Emergency Court of Appeals was limited to a determination that the price schedule was "arbitrary or capricious", a well-nigh impossible task in Wartime. The Court had no right to substitute its judgment for that of the Administrator. (Title 50, U. S. C. A. § 924)

If Commodities' petition for a rehearing is denied, a modification of the judgment of the Court is requested on the following grounds and to the following extent:

Commodities tried its case before the Court of Claims in accordance with the rules which had been laid down by that Court, particularly in *Kaiser* v. *United States*, 69 Fed. Supp. 555, and *Pantex Pressing Machine* v. *United States*, 71 Fed. Supp. 859, and emphasized the so-called "retention value". But, in addition thereto, it proved many of the factors which it considered bore on the question of value and just compensation, such as the ceiling price for ground pepper, the ceiling price for imitation or synthetic pepper, and the fact that Regulation 52 did not impose a ceiling price at all on pepper sold in quantities of less than one bag (that is, in amounts less than approximately 150 pounds each).

The Court of Claims found the facts with respect to these various items, except the last named, concerning which no finding was made, and probably none was necessary, as the Court takes judicial notice of Government Regulations, and rendered judgment for plaintiffs.

However, the findings of the Court of Claims were generally much weaker than the proof, and with respect to the above enumerated matters, the Court did not find that Commodities was currently able to sell its pepper at the price fixed for ground pepper or the price for synthetic pepper, although the evidence to support such a finding was introduced and Commodities assigned error to the failure to find such facts.

Certainly, if Commodities had had the right in 1944 to sell ground pepper at the OPA ceiling price of 12 cents per pound and upward, and if the additional cost of selling the pepper as ground pepper, rather than as whole pepper, was approximately two cents the value of the pepper and

the loss sustained by Commodities by reason of the taking of it was at least 10 cents. So with respect to the ceiling price of synthetic pepper, if the details had been proven and found by the Court of Claims with respect to the ability to sell at such ceiling price, with a net return of more than 15 cents per pound upon the pepper used, after allowing for grinding and the cost of the neutral agents, the value of the pepper and the loss to Commodities could not have been less than such amount.

In this connection, it must be recollected that conditions in Indonesia were most unsettled up to the close of Commodities' case, and that the life of a white man was not safe in many portions of Sumatra and Java. The testimony showed that Commodities' witness, the Hollander Greisheimer, had recently been released from a Japanese prison camp where he had spent several years.

In all of the above circumstances, Commodities submits that if this Court reverses, the proper form of judgment for this Court to render is a reversal and a direction for a new trial in accordance with the opinion of this Court.

A direction to the Court of Claims to find "just compensation" at the ceiling price of 6½ cents should be rendered only in case the Court is prepared to go so far as to hold that the ceiling price is the only factor which can be considered in determining "just compensation".

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that

(1) The judgment of the Court of Claims be, upon further consideration, affirmed, or

(2) In the event that this Court should, after such rehearing, decline to affirm the judgment of the Court of Claims, that this Court modify and amend its judgments

herein by directing the Court of Claims to receive further evidence of the value of petitioners' pepper and of just compensation, if offered, and to make further findings of value and just compensation in accordance with the principles of law established by this Court in its opinion herein.

Respectfully submitted,

EDWARD L. BLACKMAN,
Counsel for COMMODITIES TRADING CORPORATION, *et als.*

I, Counsel for the above named COMMODITIES TRADING CORPORATION, *et als.*, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EDWARD L. BLACKMAN,
Counsel for COMMODITIES TRADING CORPORATION, *et als.*